See 166 U. S. 1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 701.

165-721

THE UNITED STATES, PETITIONER,

vs.

THE STEAMER "THREE FRIENDS," HER ENGINES, &c., NAPOLEON B. BROWARD AND MONTCALM BROWARD, CLAIMANTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FILED JANUARY 30, 1897.
CERTIORARI AND RETURN FILED FEBRUARY 8, 1897.

(16,480.)

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SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1897.

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1–3 District Court of the United States, Southern District of Florida. In Admiralty.

Be it remembered, that on the 12th day of Nov., A. D. 1896, the United States of America, by its attorneys, Frank Clark and H. H. Buckman, Esqs., filed in the office of the clerk of the said court of Jacksonville a libel of information against the steamship "Three Friends," her boats, tackle, engines, boilers, apparel, and furniture, in a cause of forfeiture, in the words and figures following, to wit:

In the District Court of the United States, Southern District of Florida. In Admiralty.

To the Honorable James W. Locke, judge of said court:

The libel of information of Frank Clark and H. H. Buckman, attorneys for the said United States for the southern district of Florida, who prosecutes on behalf of the United States, and being present here in court in their proper person, in the name and on the behalf of the United States, against the steamer "Three Friends," her engines, tackle, apparel, and furniture, and against all persons intervening for their interests therein, in a cause of forfeiture, alleges and informs as follows:

First. That Cyrus R. Bisbee, collector of customs for the district of St. Johns, heretofore, to wit, on the 7th day of November, in the year of our Lord eighteen hundred and ninety-six, and within the southern district of Florida, on the waters that are navigable from the sea by vessels of ten or more tons burthen, to wit, at or near the mouth of the St. Johns river, within said district of St. Johns and said southern district aforesaid, seized, as forfeited to the use of the United States, the steamboat or vessel called the "Three Friends," her engines, tackle, machinery, apparel, and furniture, being the property of some person or persons to the said attorneys unknown.

Second. That the said steam vessel "Three Friends" is a steamboat or steam vessel of the ton-age of eighty-nine and thirty-four one-hundredths tons net, according to her new measurements, or one hundred and thirty-seven and thirty-five one-hundredths tons net, according to her old measurements, and is now still held by the said C. R. Bisbee, collector of customs, under said seizure, within the southern district and within the collection district of St. Johns and the port of Jacksonville.

Third. That the said steamboat or steam vessel, the "Three Friends," was on, to wit, on the twenty-third day of May, A. D. 1896, furnished, fitted out, and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace.

In the District Court of the United States, Southern District of Florida. In Admiralty.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS."

And now Napoleon B. Broward and Montcalm Broward, intervening for the interest of themselves, appear before the court and make claim to the said steam vessel "Three Friends," her engines, boats, tackle, boiler, machinery, anchors, chains, cables, apparel, and furniture, as the same are attached by the marshal under the process of this court, at the suit of the United States, and the said Napoleon B. Broward and Montcalm Broward aver that they were in possession of the said steam vessel at the time of the attachment thereof, and that they, Napoleon B. Broward to the extent of $\frac{58}{60}$, and Montcalm Broward to the extent of $\frac{2}{60}$, are the *bona fide* owners of said steam vessel, and that no other person is the owner thereof, and that Montcalm Broward is the master of said steam vessel.

6 Wherefore they pray that they may be admitted to defend accordingly.

(S'g'd) MONTCALM BROWARD.
(S'g'd) N. B. BROWARD.

Sworn to and subscribed before me this 14th day of November, A. D. 1896.

[SEAL.] N. P. BRYAN,
Notary Public, State at Large.
J. M. BARRS,
Proctor for Libellant.

Claim filed Nov. 14, 1896. E. O. Locke, clerk, by Louis Starke, d'p'y clerk.

Claimants' Petition for Release of "Three Friends."

In the United States District Court for the Southern District of Florida.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS," of the Port of Jacksonville, HER TACKLE AND APPAREL.

In admiralty. Libel of information for forfeiture of vessel for violation of neutrality laws, etc.

To the Honorable James W. Locke, judge of the United States court for the southern district of Florida:

The petition of Napoleon B. Broward and Montcalm Broward respectfully shows:

First. That they, the said Napoleon B. Broward to the extent of $\frac{58}{60}$ and the said Montcalm Broward to the extent of $\frac{2}{60}$ are the sole

and only owners of the vessel called the "Three Friends," of the port of Jacksonville, Florida.

Second. That said vessel lately, to wit, on the 17th day of September, 1896, at the port of Fernandina, Florida, was taken into custody by the Honorable B. L. Baltzell, collector of customs in and for the district and port of Fernandina, Florida.

Third. That on the 15th day of October, 1896, said vessel was in the custody of James McKay, United States marshal in and for the said district, under and by virtue of a process of attachment from the said district court, said writ being a process of attachment for forfeiture, for violation of law, alleged in said libel as of the 2nd day of September, 1896, issued upon a libel of information in said court by Honorable Frank Clark, United States attorney for the southern district of Florida, and which is now pending in said court.

Fourth. That on the fifteenth day of October, 1896, your petitioners having filed their petition for an order directing the said United States marshal to deliver to them the said steam vessel
7 "Three Friends" upon their executing a bond to the said United States, in accordance with the statute in such case made and provided, did in pursuance of an order made by your honor make and file with the clerk of the court a good and sufficient bond, with two good and sufficient sureties, in the sum of seven thousand dollars ($7,000.00), conditioned to produce the said steam vessel "Three Friends," her engines, tackle, apparel, and furniture, etc., whenever the same may be required conformably to law, which said bond was duly procured as prescribed in and by your honor's said order.

Fifth. That upon the filing and approval of said bond the said steam vessel "Three Friends," her engines, tackle, apparel, and furniture, etc., were, under the provisions of and in compliance with your honor's said order, turned over and surrendered by the said James McKay, United States marshal, as aforesaid, to the custody and possession of your petitioners on the 15th day of October, 1896.

Sixth. That from the time of the delivery of the said steamer Three Friends to your petitioners down to about 7 o'clock p. m. on the 7th day of November, 1896, the said steam vessel "Three Friends" was used by your petitioners exclusively in their legitimate business of towing and wrecking upon and in the vicinity of the St. Johns bar, and the said steamer was being so used by your petitioners in the charge and command of Capt. Montcalm Broward, one of your petitioners, in her regular towing business on the St. Johns bar and the St. Johns river when she was seized as hereinafter mentioned.

Seventh. That said vessel lately, to wit, on the 7th day of November, 1896, at the port of Jacksonville, Florida, while so in the custody of your petitioners, under the said order of the court, and engaged in her regular legitimate business of towing, was taken into custody by the Honorable C. R. Bisbee, collector of customs in and for the district and port of Jacksonville, Florida.

Eighth. That said vessel is now in the custody of the United States marshal, James McKay, in and for said district, under and by virtue

In the District Court of the United States, Southern District of Florida. In Admiralty.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS."

And now Napoleon B. Broward and Montcalm Broward, intervening for the interest of themselves, appear before the court and make claim to the said steam vessel "Three Friends," her engines, boats, tackle, boiler, machinery, anchors, chains, cables, apparel, and furniture, as the same are attached by the marshal under the process of this court, at the suit of the United States, and the said Napoleon B. Broward and Montcalm Broward aver that they were in possession of the said steam vessel at the time of the attachment thereof, and that they, Napoleon B. Broward to the extent of $\frac{58}{60}$, and Montcalm Broward to the extent of $\frac{2}{60}$, are the *bona fide* owners of said steam vessel, and that no other person is the owner thereof, and that Montcalm Broward is the master of said steam vessel.

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(S'g'd) N. B. BROWARD.

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In admiralty. Libel of information for forfeiture of vessel for violation of neutrality laws, etc.

To the Honorable James W. Locke, judge of the United States court for the southern district of Florida:

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First. That they, the said Napoleon B. Broward to the extent of $\frac{58}{60}$ and the said Montcalm Broward to the extent of $\frac{2}{60}$ are the sole

and only owners of the vessel called the "Three Friends," of the port of Jacksonville, Florida.

Second. That said vessel lately, to wit, on the 17th day of September, 1896, at the port of Fernandina, Florida, was taken into custody by the Honorable B. L. Baltzell, collector of customs in and for the district and port of Fernandina, Florida.

Third. That on the 15th day of October, 1896, said vessel was in the custody of James McKay, United States marshal in and for the said district, under and by virtue of a process of attachment from the said district court, said writ being a process of attachment for forfeiture, for violation of law, alleged in said libel as of the 2nd day of September, 1896, issued upon a libel of information in said court by Honorable Frank Clark, United States attorney for the southern dis rict of Florida, and which is now pending in said court.

Fourth. That on the fifteenth day of October, 1896, your petitioners having filed their petition for an order directing the said United States marshal to deliver to them the said steam vessel
7 "Three Friends" upon their executing a bond to the said United States, in accordance with the statute in such case made and provided, did in pursuance of an order made by your honor make and file with the clerk of the court a good and sufficient bond, with two good and sufficient sureties, in the sum of seven thousand dollars ($7,000.00), conditioned to produce the said steam vessel "Three Friends," her engines, tackle, apparel, and furniture, etc., whenever the same may be required conformably to law, which said bond was duly procured as prescribed in and by your honor's said order.

Fifth. That upon the filing and approval of said bond the said steam vessel "Three Friends," her engines, tackle, apparel, and furniture, etc., were, under the provisions of and in compliance with your honor's said order, turned over and surrendered by the said James McKay, United States marshal, as aforesaid, to the custody and possession of your petitioners on the 15th day of October, 1896.

Sixth. That from the time of the delivery of the said steamer Three Friends to your petitioners down to about 7 o'clock p. m. on the 7th day of Novwmber, 1896, the said steam vessel "Three Friends" was used by your petitioners exclusively in their legitimate business of towing and wrecking upon and in the vicinity of the St. Johns bar, and the said steamer was being so used by your petitioners in the charge and command of Capt. Montcalm Broward, one of your petitioners, in her regular towing business on the St. Johns bar and the St. Johns river when she was seized as hereinafter mentioned.

Seventh. That said vessel lately, to wit, on the 7th day of November, 1896, at the port of Jacksonville, Florida, while so in the custody of your petitioners, under the said order of the court, and engaged in her regular legitimete business of towing, was taken into custody by the Honorable C. R. Bisbee, collector of customs in and for the district and port of Jacksonville, Florida.

Eighth. That said vessel is now in the custody of the United States marshal, James McKay, in and for said district, under and by virtue

of a process of attachment from the said district court in and for the southern district of Florida, said writ being a process of attachment for forfeiture, issued upon a libel of information in said court by Hons. Frank Clark and H. H. Buckman, attorneys of the United States for the southern district of Florida, charging violation of law, as of the 23rd day of May, 1896, and which is now pending in said court. That on account of said seizure your petitioners are compelled, at great expense to themselves, to charter another steamer to do the towing business of the steamer "Three Friends," but your petitioners are unable to obtain a steamer as well fitted for the towing business as is the steamer "Three Friends."

Ninth. Petitioners now come and pray your honor to order and direct the said James McKay, United States marshal as aforesaid, to deliver to them the said steam vessel "Three Friends," of the port of Jacksonville, Florida, together with all her tackle, apparel, and furniture, upon their executing a bond to the United States in accordance with the statutes in such cases made and provided.

Tenth. Petitioners now come and pray your honor to fix, on appraisement or otherwise, the amount of the proper bond to be given by the owners of the said steam vessel "Three Friends,"
8 for the proper forthcoming of the said steam vessel "Three Friends," in case the judgment or decree of said court shall pass against the said claimants, to answer the said judgment of decree.

(S'g'd) MONTCALM BROWARD.
(S'g'd) N. B. BROWARD.

J. M. BARRS,
A. W. COCKRELL & SON,
Attorneys for said Owners.

Petition filed Nov. 14, '96.

EUGENE O. LOCKE, *Clerk.*

STATE OF FLORIDA, }
Duval County. }

Before me personally appeared Napoleon B. Broward and Montcalm Broward, to me well known, who, after being by me first duly sworn, say that they are the true and *bona fide* owners of the vessel called the "Three Friends," of the port of Jacksonville, Florida, above mentioned, and that no other person is the owner thereof.

MONTCALM BROWARD.
N. B. BROWARD.

Sworn to and subscribed before me this 14th day of November, A. D. 1896.

N. P. BRYAN,
Notary Public, State at Large.

(Indorsed:) In United States district court, southern district of Florida. In admiralty. The United States *vs.* Steamer "Three Friends." Petition. Filed Nov. 14th, 1896. Eugene O. Locke, clerk.

In the District Court of the United States, Southern District of Florida. In Admiralty.

UNITED STATES
vs.
STEAM VESSEL "THREE FRIENDS."

Exceptions to Libel.

Now comes N. B. Broward and Montcalm Broward, the owners of said steam vessel "Three Friends," and file the following exceptions and objections, severally, to the libel herein:

1. Sec. 5283, for an alleged violation of which the said vessel is sought to be forfeited, makes such forfeiture dependent upon the conviction of a person for doing the act or acts denounced in the first sentence of said section, and as a consequence of conviction of such person; whereas the allegations in said libel do not show what persons had been guilty of the acts therein denounced as unlawful.

2. The said libel does not show the "Three Friends" was fitted out and armed, attempted to be fitted out and armed, or procured to be fitted out and armed in violation of said section.

9 3. The said libel does not show the said vessel was so fitted out and armed, or so attempted to be fitted out and armed, or so procured to be fitted out and armed or furnished, with the intent that said vessel should be employed in the service of a foreign prince, or State, or of a colony, district, or people with whom the United States are at peace.

4. The said libel does not show by whom said vessel was so fitted out.

5. Said libel does not show in the service of what foreign prince, or State, or colony, or district, or body politic the said vessel was so fitted out.

6. The said libel does not show that said vessel was so armed or fitted out or furnished with the intent that such vessel should be employed in the service of any body politic recognized by or known to the United States as a body politic.

Wherefore, and for divers other grounds appearing on the face of said libel, it is prayed that said libel be dismissed.

A. W. COCKRELL & SON,
Proctors for the Owners.

(Indorsed:) In the district court of the United States, southern district of Florida. In admiralty. The United States *vs.* The Steam Vessel "Three Friends." Exceptions to libel. Filed Nov. 30th, 1896. Eugene O. Locke, clerk. A. W. Cockrell & Sons, proctors for owners "Three Friends."

District Court of the United States, Southern District of Florida.

THE UNITED STATES
vs.
THE STEAMTUG THE "THREE FRIENDS."

This vessel being under attachment and in custody of th- marshal under a libel for a violation of sec. 5283 of R. S., the claimant moves that they may be permitted to have an appraisement had and give bonds so as to obtain pos-ession of the vessel pending the hearing of the cause. The district attorney opposes this motion, and cites in support of his opposition the case of the "Mary L. Hogan," decided by Judge Brown, of the S. district of New York, and reported in 17th F. R., 813. It is also contended that in case a vessel is libelled for a forfeiture no bond can be accepted, and refers to sec. 941, R. S.

The section referred to is only a limit upon the power of the marshal to stay admiralty process, and does not effect the action of the court whatever.

That the filing of a libel for forfeiture is such a declaration of a forfeiture, without even a preliminary examination or *prima facie* showing that the claimant has no right to give a bond for his property, pending a hearing, especially when the Government declares itself not ready for a hearing, is so repugnant to any idea of the right of private property and so declaratory of arbitrary confiscation that were it an open question it could no- be entertained. But it has been carefully considered and determined. Justice Story, in the case of "The Alligator" (1 Gall., 145), which was libel for forfeiture, in which case it was contended that the court had no authority to deliver the property on bond in a case of this nature, says:

"I understand that in all proper cases of seizure, under whatever statute made, the invariable practice in the district court has been to take bond for the property whenever application has been made by the claimant for the purpose.

"No doubt has hitherto existed respecting the right of that court to take such bonds. * * * That practice, I understand, has been recognized and sanctioned by my predecessors in this court, and I should not now feel at liberty to disturb, upon slight grounds, a practice so well settled, whatever might be my own impressions as to its regularity. The practice has been of great public convenience, and to claimants in particular it has been peculiarly beneficial. * * * Whether there be any statute existing which authorized the delivery on bond or not is not, in my judgment, material. The cause was civil cause of admiralty and maritime jurisdiction. and nothing can be better settled than that the admiralty may take fidejussory caution of stipulation in case *in rem*, and may in a summary manner award judgment and execution there. The district court possessing this jurisdiction and being fully authorized to adopt the process and modes of proceeding of the admiralty * * * had an undoubted right to deliver the property on bail and to enforce a conformity to the terms of the bailment."

This I consider is the well-established law upon the subject, and I have failed to find any case where it has been questioned.

In the case of the "Mary L. Hogan" this general law was not questioned, but it was held to be within the discretion of the court to grant or deny a release on bond according to the circumstances of the case, and while I concur fully in the views of the learned judge in that case I consider that the circumstances of this case differ so materially that a different conclusion may well be reached. In that case the seizure was made immediately after the fitting out and while preparing to leave, and when the motion was heard she was fully prepared to proceed on her alleged illegal voyage, and all circumstances pointed clearly to the conclusion that if released she would proceed. In this case the libel charges a past offence, several months prior to the seizure, and there is nothing to show, nor is there any intimation, but that at the time of seizure she was engaged in the legitimate prosecution of her regular business of towing on the St. Johns river.

The case of the "Hogan" at the time of that decision was ready for a hearing and immediate determination; in this case exceptions to the libel have been filed raising important questions of law, on which the Government is not ready for argument, and the consideration of which may cause more or less delay in the trial.

There is no suggestion, intimation, or reason to believe that if released on bond this vessel would attempt any violation of law.

Under the circumstances it is considered that the case does not present such un-sual features as to call for an exceptional ruling upon the question of admitting to bail, and it is ordered that upon an appraisement being had said claimants be permitted to enter in bond and stipulation as by law provided for the release of vessels under attachment.

J. W. LOCKE, *Judge.*

Filed Dec. 3, 1896.

E. O. LOCKE, *Clerk.*

11 In the District Court, Southern District of Florida.

In Re THE STEAMER "THREE FRIENDS," &c. Violation of Sec. 5283, R. S.

The petition of claimants for appointment of appraisers and authority to give bond for said steamer, being presented, argued, and considered, it is ordered that A. D. Stevens and W. B. Watson are appointed to appraise the value of said steamer "Three Friends," her tackle, apparel, and furniture, having regard to the amount for which in their judgment said steamer, her tackle, apparel, and furniture would be sold on order of this court for cash at public outcry, and report their appraisement by filing their report with the clerk of this court.

It is further ordered that upon the execution and filing of a bond comformably to the statute with the claimant as principals and with sureties, the solvency and efficiency of which shall be approved by

E. O. Locke, clerk of this court, specially designated for that purpose, the said bond being in the sum fixed by said appraisers as the value of said steamer in their report and conditioned for the payment of such amount in the event that upon a final hearing the court shall decree said steamer to be forfeited, the marshal for the southern district of Florida shall turn over and surrender the custody and possession of the said steamer "Three Friends," her tackle, apparel, and furniture now in his hands to the said Napoleon B. Broward and Montcalm Broward, claimants.

Done and ordered this third day of December, A. D. 1897.

JAMES W. LOCKE, *Judge.*

(Endorsed:) U. S. dist. court, so. dist. Fla. United States *vs.* Str. "Three Friends." Violation sec. 5283, R. S. Order for appraisement and bond. Filed Dec. 3rd, 1896. E. O. Locke, clerk. L. Starke, dep. clerk.

United States District Court, Southern District of Florida.

UNITED STATES
vs.
STR. "THREE FRIENDS."

A. D. Stevens and W. B. Watson having been appointed to appraise the value of said vessel, her tackle, apparel, and furniture, etc., do hereby solemnly swear that they will well and faithfully appraise the value of such property and true return make thereon to said court.

A. D. STEVENS.
W. B. WATSON.

Sworn to and subscribed before me this 3rd December, 1896.

EUGENE O. LOCKE, *Clerk.*

(Endorsed:) U. S. district court, southern district of Florida. United States *vs.* S. S. "Three Friends." Oath of appraisers. Filed Dec. 3rd, 1896. Eugene O. Locke, clerk.

12 In the District Court, Southern District of Florida.

In Re THE STEAMER "THREE FRIENDS," &c. Violation of Sec. 5283, R. S.

The undersigned, appraisers appointed by the order of this court December 3rd, 1896, respectfully report that they have appraised the value of the said steamer "Three Friends," her tackle, apparel, and furniture, having regard for the amount for which, in their judgment, said steamer, her tackle, apparel, and furniture would be sold on order of this court for cash at public outcry, and hereby respectfully report that they have so appraised said steamer "Three Friends," her tackle, apparel, and furniture, at four thousand $\frac{00}{100}$ dollars, and file this as their report, this 4th day of December, 1896.

A. D. STEVENS,
W. B. WATSON,
Appraisers.

(Endorsed:) U. S. dist. ct., so. dist. Fla. United States *vs.* Str. "Three Friends." Appraisers' report. $4,000.00. Filed Dec. 4th, 1896. E. O. Locke, clerk.

In the United States District Court, Southern District of Florida.

THE UNITED STATES *vs.* THE STEAMER "THREE FRIENDS." } Violation of Section 5283, Revised Statutes.

Know all men by these presents that we, Napoleon B. Broward, Montcalm Broward, and the Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, are held and firmly bound unto the United States in the sum of ten thousand ($10,000) dollars, lawful money of the United States, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of December, 1896.

The condition of this obligation is such that whereas a libel is now pending in the United States district court for the southern district of Florida at the suit of the United States against the steam vessel "Three Friends," her tackle, apparel, and furniture, whereof the said N. B. Broward and Montcalm Broward are claimants, and the said claimants having prayed that the said vessel, her tackle, apparel, and furniture shall be delivered to them on the execution of a bond to the United States for the payment of the appraised value of said steamer, her tackle, apparel, and furniture, which value has been duly appraised at ten thousand dollars:

Now, if the said Napoleon B. Broward and the said Montcalm Broward shall well and truly pay to the United States the said amount of ten thousand dollars in case the decree of said court shall pass against them to that effect, then this obligation shall be void, otherwise to remain in full force and virtue.

NAPOLEON B. BROWARD. [SEAL.]
MONTCALM BROWARD. [SEAL.]
FIDELITY & DEPOSIT CO.
OF MARYLAND, [SEAL.]
By D. U. FLETCHER, *Attorney-in-fact.*

13 Signed, sealed, and delivered in presence of us—

As to Browards:
J. M. BARRS.
N. P. BRYAN.

As to F. & D. Co.:
JNO. W. DODGE.
CAROLINE HARDING.

Attest: SAM'L J. SLATER, JR.,
Agent for the Company.

Approved Dec. 7th, 1896.

EUGENE O. LOCKE, *Clerk.*

(Indorsed:) # 131 O. L., 7. United States *vs.* S. S. "Three Friends." Bond. Filed Dec. 7th, 1896. Eugene O. Locke, clerk.

United States District Court, Southern District of Florida.

On Monday, December 28th, 1896, this cause came on to be heard before said court upon exceptions to libel.

Present: Honorable James W. Locke, judge; both parties being represented by counsel.

And the exceptions herein being fully argued, — both libellant and respondent, and the same are submitted to the court, and decision is reserved.

Afterward, to wit, upon consideration thereof, parties being present, by counsel, it is decreed as follows:

District Court of the United States, Southern District of Florida.

THE UNITED STATES
vs.
THE STEAMBOAT "THREE FRIENDS." } Libel for Forfeiture.

This cause coming on to be heard upon exceptions to the libel and having been fully heard and considered, it is ordered that said second, third, fifth, and sixth exceptions be sustained and that the libellant have permission to amend said libel, and in event said libel is not so amended within ten days the same stand dismissed and the bond herein filed be canceled.

JAMES W. LOCKE, *Judge.*

Jacksonville, Fla., January 18, 1897.

(Endorsed:) District court. United States *vs.* Str. "Three Friends." Decree sustaining exceptions to libel. Filed Jan. 18, 1897. E. O. Locke, clerk.

14 In the District Court of the United States for the Southern District of Florida. In Admiralty.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS." } Libel of Information for Forfeiture.

To A. W. Cockrell & Sons and J. M. Barrs, proctors for claimants and appellees.

SIRS: Please take notice that the libellants herein hereby appeal from the final decree made and entered herein on the eighteenth day of January, A. D. 1897, to the United States circuit court of appeals for the fifth circuit, to be holden in and for said circuit at the city of New Orleans, Louis-ana.

This twenty-third day of January, A. D. 1897.

FRANK CLARK,
United States Attorney for the Southern District of Florida,
Proctor for the Libellants.
CROWELL GIBBONS,
Ass't U. S. Att'y and Proctor for Libellants.

Service of the above notice of appeal is hereby accepted this January 23rd, 1897.

A. W. COCKRELL & SON,
Proctors for Claimants and Appellees.

(Endorsed:) Dist. ct. of the U. S. for the so. dist. Fla. In admiralty. The United States *vs.* The Steam Vessel "Three Friends." Notice of appeal. Filed Jan. 23rd, 1897. E. O. Locke, clerk, by Louis Starke, dep'y clerk.

United States District Court, Southern District of Florida.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS." } Libel of Information for Forfeiture.

Assignment of Errors.

The libellants hereby assign errors in the ruling and proceeding of the district court herein, as follows:

First. For that the court over the objection of the libellants allowed the said steam vessel "Three Friends" to be released from custody upon the giving of bond.

Second. For that the court erred in sustaining the 2nd, 3rd, 5th, and 6th exceptions of the claimants to the libel of information of the libellants.

Third. For that the court erred in entering a decree dismissing the libel of information herein.

15 Jacksonville, Florida, January 23rd, A. D. 1897.

FRANK CLARK,
United States Attorney for the Southern District of Florida,
CROMWELL GIBBONS,
Ass't United States Attorney for the Southern District of Florida, Proctors for Libellants.

(Endorsed:) In the district court of the U. S. for the so. dist. of Fla. In admiralty. The United States *vs.* The Steam Vessel "Three Friends." Assignment of errors. Filed Jan. 23rd. E. O. Locke, clerk, by Louis Starke, dep'y clerk.

United States District Court, Southern District of Florida.

UNITED STATES
v.
THE STEAM VESSEL "THREE FRIENDS." } Libel of Information for Forfeiture.

To the judges of the United States circuit court of appeals for the fifth circuit:

The petition of the United States of America respectfully shows to the court:

That on the 12th day of November, A. D. 1896, the libellants filed a libel of information in the United States district court for

the southern district of Florida against the said steam vessel "Three Friends," praying that for the reasons set forth in said libel that the said steam vessel "Three Friends," her tackle, apparel, and furniture might be condemned by the definitive sentence and decree of said court as forfeited to the use of the said United States.

That upon the filing of the said libel of information an attachment and monition were issued by the clerk of said court in due form and said steam vessel "Three Friends" was taken into the custody of the court by the marshal of the southern district of Florida thereunder.

That thereafter, to wit, on the 14th day of November, A. D. 1896, one Montcalm Broward and N. B. Broward appeared in the said suit and made claim as owners of the said steam vessel "Three Friends," and at the same time filed in said court their petition praying that an appraisement of said vessel might be had and they, the said claimants, allowed to give bond for the release of said steam vessel from custody.

That thereafter, to wit, on the 30th day of November, A. D. 1896, the said claimants filed in said court their exceptions to the libel of information filed by your petitioners, praying that said libel of information might be dismissed for the causes therein set forth.

That thereafter, to wit, on the 3rd day of December, A. D. 1896, the judge of said court issued an order allowing the petition of said claimants, appointing appraisers, and granting bail over and against the objection of your petitioners.

That thereafter, to wit, on the 18th day of January, in the year 1897, issue having been joined upon the exceptions of the claimants to the libel of information of your petitioners, the same came on to be heard, the Honorable James W. Locke, judge of the
16 said court, and such proceedings were thereupon had that on the 18th day of January, A. D. 1897, the judge pronounced in favor of and sustained the 2nd, 3rd, 5th, and 6th exceptions of the said claimants to the libel of information of your petitioners, and thereupon caused to be entered a decree dismissing petitioner's libel of information.

That your petitioners are advised and insist that the order of the honorable district court allowing bail for said vessel entered therein on the 3rd day of December, A. D. 1896, is erroneous, in that bail cannot be allowed in proceedings for the absolute forfeiture of vessels.

That your petitioner is advised and insists that said decree dismissing petitioner's libel of information is erroneous, in that it sustains the 2nd, 3rd, 5th, and 6th exceptions of the claimants to petitioner's libel of information. For this and other reasons your petitioners appeal from the said final decree to the United States circuit court of appeals for the fifth circuit, and on said appeal intends to secure a new decision on the law upon the pleadings in said district court, and to that end prays that the records and proceedings of said court may be returned to the United States circuit court of appeals for the fifth circuit, and that the said decree may

be reversed and the libel of information be sustained with costs in the district court and in this court.

This 23rd day of January, A. D. 1897, at Jacksonville, Florida.

FRANK CLARK,
United States Attorney for the Southern District of Florida, Proctor for Libellants.
CROMWELL GIBBONS,
Ass't United States Att'y for Southern District of Florida and Proctors for Appellants.

The foregoing appeal is hereby allowed.
Jacksonville, Florida, January 23rd, A. D. 1897.
JAMES W. LOCKE, *Judge.*

(Endorsed:) In the district court of the United States for the so. dist. Fla. In admiralty. The United States *vs.* The Steam Vessel "Three Friends." Petition of appeal. Filed Jan. 23rd, 1897. E. O. Locke, clerk, by Louis Starke, dep'y clerk.

Opinion.

District Court of the United States, Southern District of Florida.

THE UNITED STATES
vs.
THE STEAMER "THREE FRIENDS." } Forfeiture.

This vessel has been libeled for forfeiture under the provisions of the section 5283 of the Revised Statutes of the United States.

The libel alleges that said steam vessel was on the 23rd day of May, A. D. 1896, furnished, fitted, and armed "with intent that she should be employed by certain insurgents or persons in the island of Cuba to cruise or commit hostilities against the subjects,
17 citizens, or property of the said island of Cuba and against the King of Spain and the subjects, citizens, and property of the said King of Spain in the island of Cuba, with whom the United States are and were at that date at peace."

To this there have been exceptions filed upon two grounds:

1st. That forfeiture under this section depends upon the conviction of a person or persons for doing the acts denounced; and

2nd. That the libel does not show that the vessel was armed or fitted out with the intention that she should be employed in the service of a foreign prince or State, or of any colony, district, or people recognized or known to the United States as a body politic.

The first objection raised by these exceptions is easily disposed of by the language of the Supreme Court in the case of the "Palmyra" 12 Wheaton, 1, where, after elaborate argument, it is said:

"Many cases exist, when the forfeiture for acts done attaches solely *in rem* and there is no accompanying penalty *in personam;* many cases exist where there is both a forfeiture *in rem* and a personal penalty; but in neither class of cases has it ever been decided

that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam*." * * *

"In the judgment of this court no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature."

The other question raised by the exceptions is more difficult and requires a construction of the clause of the section 5283, "with intent that such vessel should be employed in the service of any foreign prince or State, or of any colony, district, or people," and more particularly the significance of the words "colony, district, or people," and a determination whether the requirements of the law are satisfied by the allegations of the libel that the vessel was intended to be employed "in the service of certain insurgents or persons in the island of Cuba," and whether the statute admits a construction which would make a vessel liable to forfeiture when fitted out for the intended employment of any one or more persons not recognized as a political power by the Executive of our nation.

The section under which this libel has been filed was originally the third section of the act of June 5, 1794, I Stat., 281, c. 50, and the language at that time only contained the provision that the vessel should be fitted out with intent that said vessel should be employed in the service of any foreign prince or State to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State with whom the United States might be at peace.

While that was the language of the act, the question came before the Supreme Court in the case of Gelston *vs.* Hoyt, 3d Wheaton, 328, and, in speaking of a plea considered necessary for a defense to a suit for damages for a seizure under this statute, it was held that such plea was bad, "because it does not aver the governments of Petion and Christophe are foreign States which have been duly recognized as such by the Government of the United States."

In this case there was no distinction made between the party in whose service the vessel was to be employed and the one against whom hostilities were intended, and the language of the court
18 would fully justify the conclusion they should both have been recognized, either as princes or States.

Subsequently, as is stated by Mr. Wharton in his work on International Law, upon the outbreak of war between the South American colonies and Spain, upon a special message of the President to Congress upon the subject, the words "or of any colony, district, or people" were added to the description of both parties contemplated—both that one into whose employment the vessel was to enter and that one against whom the hostilities were contemplated.

Has the addition of these words changed the character of the party intending to employ such vessel from that of a political power duly recognized as such, as is declared by the court in Gelston *vs.* Hoyt, to that of a collection of individuals without any recognized political position? This question has been before the courts fre-

quently, and several times been examined and commented upon, but in no case which I have been able to find has it been so presented, unconnected with questions of fact, that there has been a ruling upon it so that it can be considered as final and conclusive.

Beyond question the courts are bound by the actions of the political branch of the Government in the recognition of the political character and relations of foreign nations, and of the conditions of peace or war.

The act of 1794, as well as its modification, that act of 1818, used the same language in describing the power or party in whose behalf or into whose service the vessel was intended to enter as was used in describing the political power against which it is intended that hostilities should be committed; and as far as the language itself goes it is impossible to say that in using the words in one clause of the sentence the political character and power was intended, while in another clause of the same sentence words used in exactly the same connection and with apparently the same force and meaning were intended to represent not the political power but the individuals of a certain colony, district or people.

It is contended that although the original act of 1794 required the construction given it in Gelston *vs.* Hoyt, that each party should be one duly recognized by the United States, yet the modification of 1818 so changed it that it should be held to apply to any persons, regardless of their political character, for whose service a vessel might be intended.

It is understood that this modification was brought about by the special message of President Madison of December 26, 1816. The question presented by this message is clearly set forth in the language used. He says: "It is found that the existing laws have not the efficacy necessary to prevent violations of the United States as a nation at peace toward belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States."

In further explanation of the condition of affairs which called for this modification of this statute may be considered the letter of Mr. Monroe, Secretary of State, to Mr. Forsythe, January 10, 1817, in which he speaks of vessels going out as merchant vessels and hoisting the flag of some of the belligerents and cruised under it, of other vessels armed and equipped in our ports hoisting such flags after getting out to sea, and of vessels having taken on board
19 citizens of the United States who, upon the arrival at neutral points, have assumed the character of officers and soldiers in the service of some of the parties in the contest then prevailing. All of this correspondence shows that the effort at that time was to enforce neutrality between recognized and belligerent parties. That the parties then in contest were recognized as belligerents and a neutrality was sought to be preserved is clearly shown by the first annual message of President Monroe in 1817. He says: "Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war."

"They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights. Our ports have been opened to both, and any articles * * * that either was permitted to take has been equally free to the other."

It is considered that this shows what was in contemplation at the time of the enactment of the law of 1818, and that what was intended was to prevent the fitting out of vessels to be employed in the service of a colony, district, or people, which had been recognized as belligerents, but which had not been recognized as an independent State, or which was not represented in the political world by a prince.

There appears to be nothing in the remedy demanded at that time, or in the language used, to show that the words so added were intended to represent or be construed as referring to the individual people of any colony, district, or people, or any number of them however designated, except as in their collective representative political capacity, any more than there is to show that the term State in the original was intended to refer to the individual people of the State.

The language of the foreign enlistment act of Great Britain, 59 George III, c. 69, 7, leaves no question as to the intention of Parliament in that legislation, as it added to the words of our statute the words, "or part of any province or people or of any person exercising or assuming to exercise any powers of government in or over any foreign State, colony, province, or parts of any province or people."

In order to give the statute under which this libel is brought the force contended for by the libellant, it is necessary to eliminate from the provision that makes it necessary to declare how the vessel is to be employed the entire clause "in the service of any foreign prince or State, or of any colony, district, or people," or to read into it the language found in the act of Great Britain, or its equivalent. That it was the general understanding at the time of the passage of the original act that it was considered to apply only to duly recognized nations is shown by the fact that, in the case of The United States *vs.* Guinet, 2 Dall., 321, under this same section—the first case brought under it—the indictment alleged fully in terms that both the State of the Republic of France, in whose service the vessel was to be employed, and the King of Great Britain were a State and a prince with whom the United States was at peace.

In the case of The United States *vs.* Quincy, C. Pet., 445, the Supreme Court says that the word people was used in this statute as simply descriptive of the power in whose service the vessel was intended to be employed, and is one of the denominations applied by the acts of Congress to a foreign power.

In the case of the Meteor, F. C., 9 498, where the original libel alleged that the vessel was fitted out with the intent that she should be employed in the service of certain persons to commit hostilities against the government of Spain, it was considered necessary to amend it by alleging that she was intended to be employed by the

government of Chili; and in that case there was presented a certificate of the Secretary of State, under seal, of the fact of the war existing between Spain and Chili, and that they were both nations with whom the United States were at peace.

In addition to the declaration of the Supreme Court in the cases of Gelston *vs.* Hoyt, and The United States *vs.* Quincy, this question has been incidentally under examination in several cases in the lower courts. In the case of the Carondelet, 37 F. R., 800, Judge Brown says: "Section 5283 is designed in general to secure our neutrality between foreign belligerent powers. But there can be no obligation of neutrality except towards some recognized State or power, *de jure* or *de facto*. Neutrality presupposes two belligerents, at least, and as respects any recognition of belligerency—*i. e.*, of belligerent rights—the judiciary must follow the executive. To fall within the statute, the vessel must be intended to be employed in the service of one foreign prince, State, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of another with which the United States are at peace. The United States can hardly be said to be at peace, in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising or committing of hostilities against such a mere faction well be said to be committing hostilities against the subjects, citizens, or property of a district or people within the meaning of the statute. So, on the other hand, a vessel in entering the service of the opposite faction of Hippolyte, could hardly be said to enter the service of a foreign prince or State, or of a colony, district, or people, unless our Government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done."

In the case of the Conserva, 38 F. R., 481, a case in which it was alleged the vessel was to be used in a contest between Legitime and Hippolyte, Judge Benedict says: "The libel in this case charges certain facts to have been done in connection with the vessel with the intention that the vessel be employed in the service of certain rebels in a state of insurrection against the organized and recognized government of Hayti, to cruise and commit hostilities against the subjects, citizens, or property of the Republic of Hayti, with whom the United States are at peace. A violation of the neutrality which the United States is obliged to maintain between the rebels mentioned and the government of the Republic of Hayti is the gravamen of the charge. But the evidence fails to show a state of facts from which the court concluded that the United States was ever under any obligation of neutrality to the rebels mentioned, or is now under any obligation of neutrality to the government of the Republic of Hayti."

21 In the case of The United States *vs.* Trumbull, 48 F. R., 99, Judge Ross (48 F. R., 99) carefully reviews the different authorities, examines the question, and clearly indicates how he would have decided the question had it been necessary for the purposes of deciding the case before. He says: "Does section 5283 of the Revised Statutes apply to any people whom it is optional with the

United States to treat as pirates? That section is found in the chapter headed 'Neutrality,' and it was carried into the Revised Statutes, and was originally enacted in furtherance of the obligations of the nation as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike; and it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other."

In speaking of the case of The United States *vs.* Quincy, in which it was said that the word "people" " was one of the denominations applied by the act of Congress to a foreign power," he says: "This can hardly mean an association of people in no way recognized by the United States or by the Government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as pirates."

In the case of The United States *vs.* The Itata, 56 F. R., 505, on appeal before the circuit court of appeals, the question was fully and carefully considered in an elaborate opinion, and although not found necessary to decide the question in this case, as the case was disposed of upon other grounds, it is considered to be apparent how the question would have been decided had it been necessary. The force of the word "people," as used in this statute, is carefully examined, as well as all other questions, and it is considered that the force of the conclusion which must necessarily result from such investigations cannot be avoided.

In the case of The United States *vs.* Hart *et al.*, Judge Brown expresses his view of this section by saying: "Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with whom we are at peace."

The same language is used by the court in the case of The United States *vs.* Wiborg, 163 U. S., 632, but it is contended in behalf of the libelant that this language was modified by the subsequent declaration made in the same case, that the operation of this statute is not necessarily dependent on the existence of such state of belligerency. In using the latter language it would seem that the court had the entire statute under contemplation, and more particularly sec. 5286, R. S., the sixth section of the original act, which plainly does not depend upon a state of belligerency or neutrality. This was the section then under consideration, as the immediate context and following sentence shows, and was the section upon which the suit was based; and it cannot be considered that this language was intended to apply to another section the consideration of which was in no way called in question.

With this understanding of the language in this case, in that case, every judicial decision, remark, or ruling, where the question has been under consideration or examination, appears to be in favor of the position taken by the claimants in the exceptions.

In the case of the "Mary N. Hogan," 18 F. R., 529, and in the

cases of the intended charge of that vessel, boxes of arms, and
22 ammunition (20 F. R., 50), it does not appear that this question was raised by the claimant or considered by the learned judge; and his language in the subsequent case of the "Carondelet," where it was raised and discussed, may be accepted as presumptive proof of what his decision would have been, had it been so considered.

The same is true of the case of the "City of Mexico," 28 F. R., 148, decided by me in this court. In that case the defense was upon entirely different grounds, and the force of the portion of the statute contended for, the necessity that there should be an intent not only that the vessel should intend to commit hostilities, but that for such purposes she should be employed in the service of some political power, was entirely lost sight of and eliminated from the consideration of the case.

The only expression authoritatively given which I have been able to find opposed to the view of the claimant in his exceptions is that of a portion of the letter of the honorable Attorney General to the Secretary of State, of December 16, 1869, 13 Op. Att'y Gen., 177, and cited in the case of United States *vs.* Wiborg. I do not consider that I should be doing myself justice to pass that by unnoticed, as it has raised more question in my mind and called for and compelled more thought and consideration than anything else connected with the case; but I feel compelled to reach a different conclusion than is there expressed.

The general purpose and intent of that letter was to declare that the insurrection in Cuba was not a fitting opportunity to enforce the provisions of this law, inasmuch as we owed no duty to such insurgents to protect them from hostilities, or rather that any contest between Spain and such insurgents could not be considered as hostilities, but incidentally it was stated that a condition of belligerency was not necessary for the operation of this statute.

It could not be considered that we owed such insurgents no such duty because we were not at peace with them, but because we had never recognized them as a colony, district, or people.

The force and effect of the letter was that the Cuban insurgents had not been recognized as a colony, district, of people, and therefore this section did not apply. If they had not been then so recognized or were not entitled to be so recognized, how can they now be so recognized or described as to come within terms of the statute in question?

It is considered that the argument used in such letter to show that the statute should be held applicable to cases where there was no condition of belligerency and but one political power recognized, would have been fully as applicable under the old law, when the case of Gelston *vs.* Hoyt decided to the contrary.

The fact that a vessel was fitted out to be employed in the service of a prince would not necessarily imply that such prince was a political power recognized by the United States any more than would the terms a "colony, district, or people," under the act of 1818. But the Supreme Court clearly held in that case that it

must be alleged that such prince or State has been recognized as such by the United States. The same argument used therein would call for the application of this statute for the forfeiting of any vessel fitted out to be employed by any person, individual, corporation, or firm, for the purpose of committing hostilities against a State
23 at peace, which would plainly not come within the provisions of the statute, however much it might be considered international policy or proper national conduct.

It is impossible in my view of the construction required by the language used to properly apply the term a people, used in the connection in which it is found, to any persons few in number and occupying a small territory with no recognized political organization, although they might procure the fitting out and arming of a vessel. I fail to find any ground for giving this statute, a criminal one as it is, any but its ordinary application. The question presented is clear and distinct, are "certain insurgents or persons in the island of Cuba" properly described by either of the terms a "colony," a district, or a people, and if so, which? The inconveniences which might arise from the political branch of our Government recognizing such insurgents as a colony, district, or people having political existence and as belligerents cannot be considered in determining whether they are entitled to such description.

This statute is a criminal and penal one, and is not to be enlarged beyond what the language clearly expresses as being intended. It is not the privilege of courts to construe such statutes according to the emergency of the occasion, or according to temporary questions of policy, but according to the principles considered to have been established by a line of judicial decisions.

It is contended that if the principles embodied in the exceptions are declared to be the law, there can be no law for the prevention of the fitting out of armed and hostile vessels to stir up insurrections and commit hostilities against nations with which we are at peace, and that such conclusion would make the parties engaged in any such expedition liable to prosecution as pirates.

To the first of these points it is considered that section 5286 is, as has been constantly held, intended to prevent any such expeditions, regardless of the character of the parties in whose behalf they were organized, the only distinction being that in that case it is necessary to bring a criminal suit and prove overt acts, while under this portion of this section the intent is the gravamen of the charge and the prosecution is against the vessel, regardless of the persons engaged in the fitting out or the ignorance or innocence of the owners.

This is not a case that can be or should be determined upon questions of public policy, and whether any parties subject themselves to prosecution for piracy or not should have no weight in its consideration. If they should be so subject they would have the benefit of the necessity of proving piratical acts rather than intentions.

It is certainly considered to be true that any such parties would be considered as pirates by Spain, and would be treated as such if found in any acts of hostility, regardless of any recognition this

nation might give them by considering them as having any political character as a people.

Without attempting further argument, but regretting that the pressing duties of a very busy term of jury trials have prevented a fuller and more complete expression of my views, it is my conclusion that the line of judicial decisions demands that a construction should be put upon the section in question which would hold that it was the intention of Congress in such enactment to prevent recognized political powers from having vessels prepared for their service in the United States, but that it was not the intention
24 to extend such prohibition to vessels fitted out to be employed by individuals or private parties, however they might be designated, for piratical or other hostilities where no protection could be obtained by a commission from a recognized government. In such case they would be held liable under the section which provides for the fitting out of a military expedition, or if they were guilty of any piratical acts upon the high seas they would become liable under the laws for the punishment of such acts. It is considered that at the time of the amendment of 1818 this construction had been declared, and the language of the amendment was in no way intended to change such construction, but was only intended to apply to the new designation of political powers the existence of which had been recognized as belligerents if not as independents, and who were entitled to the rights of neutrals; that the libel herein does not state such a case as is contemplated by the statute, in that it does not allege that said vessel had been fitted out with intent that she be employed in the service of any foreign prince or State, or of any colony, district, or people recognized as such by the political power of the United States, and unless it can be so amended should be dismissed, and it is so ordered.

* * * * * * *

Since writing the foregoing, the libel herein has been amended by inserting in place of "by certain insurgents or persons in the island of Cuba," the words "in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain in the island of Cuba," but it is considered that the objection to the libel in sustaining the exceptions has not been overcome, but that although the language has been somewhat changed, the substance has not been amended in the material part, inasmuch as it appears clearly that the word people is used in an individual and personal sense, and not as an organized and recognized political power in any way corresponding to a State, prince, colony, or district, and can in no way change my conclusion heretofore expressed, and the libel must be dismissed.

By LOCKE,
District Judge.

United States District Court, Southern District of Florida. In Admiralty.

I, Eugene O. Locke, clerk of said court, hereby certify that the foregoing document of 43 pages is a true copy of the record in the case of—

THE UNITED STATES
vs.
THE S. S. "THREE FRIENDS." } Forfeiture # 281.

lately adjudicated in said court, as appears from the records and files in my office.

In testimony whereof I hereunto set my hand and the seal of said court, at Jacksonville, in said district, this January the twenty-sixth, A. D. 1897.

[SEAL.] EUGENE O. LOCKE, *Clerk.*

(Indorsed on cover:) U. S. district court, southern district of Florida. # 281. United States *vs.* S. S. "Three Friends," etc. Apostles.

25 United States Circuit Court of Appeals, Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing pages, numbered from 3 to 24, inclusive, contain a true, full, and perfect transcript of the record filed in the office of the clerk of said court and docketed in said court, in the case of The United States, appellant, *vs.* The Steam Vessel "Three Friends," Napolion B. Broward and Montcalm Broward, claimants, appellees, No. 561, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 5th day of February, A. D. 1897.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The United States is appellant and The Steamer "Three Friends," her engines, &c., Napoleon B. Broward and Montcalm Broward, claimants, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district

court of the United States for the southern district of Florida, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
27 of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

28 [Endorsed:] Supreme Court of the United States. No. 701. October term, 1896. The United States *vs.* The Steamer "Three Friends," &c. Writ of certiorari. Filed Feb'y 5, 1897. J. M. McKee, clerk.

In the United States Circuit Court of Appeals for the Fifth Circuit.

The within writ received and filed this 5th day of February, 1897, and, by direction of the judges of the honorable the United States circuit court of appeals for the fifth circuit, I herewith return with this writ a true, full, and perfect transcript of the record of the cause named in the within writ.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States circuit court of appeals, at the city of New Orleans, State — Louisiana, this 5th day of February, A. D. 1897.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

29 [Endorsed:] Case No. 16,480. Supreme Court U. S., October term, 1896. Term No., 701. The United States, petitioner, *vs.* The Steamer "Three Friends," &c. Writ of certiorari and return. Filed Feb. 8, 1896.

165-721

165-721

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. —.701

THE UNITED STATES, APPELLANT,

vs.

THE STEAMSHIP "THREE FRIENDS," HER BOATS, TACKLE, ENGINES, ETC.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. —.

THE UNITED STATES, APPELLANT,

VS.

THE STEAMSHIP "THREE FRIENDS," HER BOATS, TACKLE, ENGINES, ETC.

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1 District court of the United States, southern district of Florida.
In admiralty.

Be it remembered, that on the 12th day of Nov., A. D. 1896, the United States of America, by its attorneys, Frank Clark and H. H. Buckman, esqs., filed in the office of the clerk of the said court of Jacksonville a libel of information against the steamship "Three Friends," her boats, tackle, engines, boilers, apparel, and furniture, in a cause of forfeiture, in the words and figures following, to wit:

In the district court of the United States, southern district of Florida.
In admiralty.

To the Honorable JAMES W. LOCKE,
Judge of said Court:

The libel of information of Frank Clark and H. H. Buckman, attorneys for the said United States for the southern district of Florida, who prosecutes, on behalf of the United States, and being present here in court in their proper person', in the name and on the behalf of the United States, against the steamer "Three Friends," her engines, tackle, apparel, and furniture, and against all persons intervening for their interests therein, in a cause of forfeiture, alleges and informs as follows:

First. That Cyrus R. Bisbee, collector of customs for the district of St. Johns, heretofore, to wit, on the 7th day of November, in the year of our Lord eighteen hundred and ninety-six, and within the southern district of Florida, on the waters that are navigable from the sea by vessels of ten or more tons burthen, to wit, at or near the mouth of the St. Johns

2 River, within said district of St. Johns and said southern district aforesaid, seized, as forfeited to the use of the United States, the steamboat or vessel called the "Three Friends," her engines, tackle, machinery, apparel, and furniture, being the property of some person or persons to the said attorneys unknown.

Second. That the said steam vessel "Three Friends" is a steamboat or steam vessel of the ton'age of eighty-nine and thirty-four one-hundredths tons net, according to her new measurements, or one hundred and thirty-seven and thirty-five one-hundredths tons net, according to her old measurements, and is now still held by the said C. R. Bisbee, collector of customs, under said seizure, within the southern district and within the collection district of St. Johns and the port of Jacksonville.

Third. That the said steamboat or steam vessel, the "Three Friends," was on, to wit, on the twenty-third day of May, A. D. 1896, furnished, fitted out, and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain, in the Island of Cuba, to cruise and commit hostilities against the subjects, citizens and property of the King of Spain, in the Island of Cuba, with whom the United States are and were at that date at peace.

Fourth. That the said steamboat or steam vessel, "Three Friends," on, to wit, on the twenty-third day of May, A. D. 1896, whereof one Napoleon B. Broward was then and there master, and within the said southern district of Florida, was then and there fitted out, furnished, and armed, with intent that said vessel, the said "Three Friends," should be employed

in the service of a certain people, to wit, the insurgents in the Island of Cuba, otherwise called the Cuban revolutionists, to cruise and commit hostilities against the subjects, property, and people of the King of Spain, in the said Island of Cuba, with whom the United States are and were then at peace.

3 Fifth. That the said steamboat or steam vessel "Three Friends" on, to wit, on the twenty-third day of May, A. D. 1896, and whereof one N. B. Broward was then and there master, within the navigable waters of the United States, and within the southern district of Florida and the jurisdiction of this court, was then and there, by certain persons to the attorneys of the said United States unknown, furnished, fitted out, and armed, being loaded with supplies and arms and ammunition' of war, and it, the said steam vessel "Three Friends," being then and there furnished, fitted out, and armed with one certain gun, or guns, the exact number to the said attorney of the United States unknown, and with munitions of war thereof, with the intent, then and there, to be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain in the Island of Cuba, and with the intent to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain, in the said Island of Cuba, and who, on the said date and day last aforesaid, and being so furnished, fitted out, and armed as aforesaid, then and there aforesaid, from the navigable waters of the United States, to wit, from the St. Johns River, within the southern district of Florida, and within the jurisdiction of this court aforesaid, proceeded upon a voyage to the Island of Cuba aforesaid, with the intent aforesaid, contrary to the form of the statute in such case made and provided. And that by force and virtue of the acts of Congress in such case made and provided, the said steamboat or steam vessel, her tackle, engines, machinery, apparel, and furniture became and are forfeited to the use of the said United States.

Sixth. And the said attorneys say that by reason of all and singular the premises aforesaid, and that by force of the statute in such

4 case made and provided, the aforesaid and described steamboat or steam vessel "Three Friends," her tackle, machinery, apparel, and furniture, became and are forfeited to the use of the said United States.

Lastly. That all and singular the premises aforesaid are and were true and within the admiralty and maritime jurisdiction of the United States and of this honorable court. Whereupon the said attorneys pray the usual process and monition of this honorable court in this behalf to be made, and that all persons interested in the before mentioned and described steamboat or steam vessel "Three Friends" may be cited in general and special to answer the premises and all due proceedings being had, that the said steamboat or steam vessel "Three Friends," her tackle, &c., may, for the causes aforesaid and others appearing, be condemned by the definite sentence and decree of this honorable court as forfeited to the use of the said United States, according to the form of th' statute in such case made and provided.

FRANK CLARK,
H. H. BUCKMAN,
Attorneys of the United States for the Southern District of Florida.

Whereupon the following order was made:

Ordered that attachment and monition issue as prayer, returnable at Jacksonville, Dec. 7, 1896.

Entered of course.

Nov. 12th, 1896. E. O. LOCKE, *Clerk.*

5 Unite' States 'istrict court, southern district of Florida.

THE UNITED STATES
vs.
THE STEAMER "THREE FRIENDS."

Whereupon attachment was issued to the marshal of said district commanding him forthwith to seize and take into his custody the American steamboat "Three Friends," her tackle, apparel, boats, and furniture, and the same safely keep to await the further order of this court.

Which attachment by him was afterwards returned duly executed and, with his return thereon endorsed, is on file in said clerk's office.

Also, monition was issued to said marshal, commanding him forthwith to cite and admonish all parties whomsoever having, or pretending to have, any right, title, claim, or interest in or to said vessel, the American steamboat "Three Friends," her tackle, apparel, boats, and furniture, to be before an admiralty session at Jacksonville, Florida, for the United States court for the southern district of Florida, on Monday, December 7th, 1896, to show cause, if any they have, why forfeiture should not be decreed as prayed in said libel.

Which monition was by the marshal afterwards returned duly executed and, with his return thereon endorsed, is on file in said clerk's office.

(Page 21, final record, United States district court, southern district of Florida.)

6 In the district court of the United States, southern district of Florida. In admiralty.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS."

And now Napoleon B. Broward and Montcalm Broward, intervening for the interest of themselves, appear before the court and make claim to the said steam vessel "Three Friends," her engines, boats, tackle, boiler, machinery, anchors, chains, cables, apparel, and furniture, as the same are attached by the marshal under the process of this court, at the suit of the United States, and the said Napoleon B. Broward and Montcalm Broward aver that they were in possession of the said steam vessel at the time of the attachment thereof, and that they, Napoleon B. Broward to the extent of 58/60, and Montcalm Broward to the extent of 2/60, are the bona fide owners of said steam vessel, and that no other person is the owner thereof, and that Montcalm Broward is the master of said steam vessel.

Wherefore they pray that they may be admitted to defend accordingly.

(Sgd.) MONTCALM BROWARD.
(Sgd.) N. B. BROWARD.

Sworn to and subscribed before me this 14th day of November, A. D. 1896.

[SEAL.] N. P. BRYAN,
Notary Public, State at Large.
J. M. BARRS,
Proctor for Libellant.

Claim filed Nov. 14, 1896. E. O. Locke, clerk. By Louis Starke, dpy. clerk.

7 *Claimants' petition for release of "Three Friends."*

In the United States district court for the southern district of Florida.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS," OF THE port of Jacksonville, her tackle and apparel.

In admiralty, libel of information for forfeiture of vessel for violation of neutrality laws, etc.

To the Honorable JAMES W. LOCKE,
Judge of the United States Court for the Southern District of Florida:

The petition of Napoleon B. Broward and Montcalm Broward respectfully shows:

First. That they, the said Napoleon B. Broward to the extent of $\frac{58}{60}$ and the said Montcalm Broward to the extent of $\frac{2}{60}$ are the sole and only owners of the vessel called the "Three Friends," of the port of Jacksonville, Florida.

Second. That said vessel lately, to wit, on the 17th day of September, 1896, at the port of Fernandina, Florida, was taken into custody by the Honorable B. L. Baltzell, collector of customs in and for the district and port of Fernandina, Florida.

Third. That on the 15th day of October, 1896, said vessel was in the custody of James McKay, United States marshal in and for the said district, under and by virtue of a process of attachment from the
8 said district court, said writ being a process of attachment for forfeiture, for violation of law, alleged in said libel as of the 2nd day of September, 1896, issued upon a libel of information in said court by Honorable Frank Clark, United States attorney for the southern district of Florida, and which is now pending in said court.

Fourth. That on the fifteenth day of October, 1896, your petitioners having filed their petition for an order directing the said United States marshal to deliver to them the said steam vessel "Three Friends" upon

their executing a bond to the said United States, in accordance with the statute in such case made and provided, did in pursuance of an order made by your honor make and file with the clerk of the court a good and sufficient bond, with two good and sufficient sureties, in the sum of seven thousand dollars ($7,000.00), conditioned to produce the said steam vessel "Three Friends," her engines, tackle, apparel, and furniture, etc., whenever the same may be required conformably to law, which said bond was duly procured as proscribed in and by your honor's said order.

Fifth. That upon the filing and approval of said bond the said steam vessel "Three Friends," her engines, tackle, apparel, and furniture, etc., were, under the provisions of and in compliance with your honor's said order, turned over and surrendered by the said James McKay, United States marshal, as aforesaid, to the custody and possession of your petitioners on the 15th day of October, 1896.

Sixth. That from the time of the delivery of the said steamer Three Friends to your petitioners down to about 7 o'clock p. m. on the 7th day of November, 1896, the said steam vessel "Three Friends" was used by your petitioners exclusively in their legitimate business of towing and wrecking upon and in the vicinity of the St. John's Bar, and the said steamer was being so used by your petitioners in the charge and command of Capt. Montcalm Broward, one of your petitioners, in her regular towing business on the St. John's Bar and the St. John's River when she was seized as hereinafter mentioned.

9 Seventh. That said vessel lately, to wit, on the 7th day of November, 1896, at the port of Jacksonville, Florida, while so in the custody of your petitioners, under the said order of the court, and engaged in her regular legitimate business of towing, was taken into custody by the Honorable C. R. Bisbee, collector of customs in and for the district and port of Jacksonville, Florida.

Eighth. That said vessel is now in the custody of the United States marshal, James McKay, in and for said district, under and by virtue of a process of attachment from the said district court in and for the southern district of Florida, said writ being a process of attachment for forfeiture, issued upon a libel of information in said court by Hons. Frank Clark and H. H. Buckman, attorneys of the United States for the southern district of Florida, charging violation of law, as of the 23rd day of May, 1896, and which is now pending in said court. That on account of said seizure your petitioners are compelled, at great expence to themselves, to charter another steamer to do the towing business of the steamer "Three Friends," but your petitioners are unable to obtain a steamer as well fitted for the towing business as is the steamer "Three Friends."

Ninth. Petitioners now come and pray your honor to order and direct the said James McKay, United States marshal as aforesaid, to deliver to them the said steam vessel "Three Friends," of the port of Jacksonville, Florida, together with all her tackle, apparel, and furniture, upon their executing a bond to the United States in accordance with the statutes in such cases made and provided.

Tenth. Petitioners now come and pray your honor to fix, on appraisement or otherwise, the amount of the proper bond to be given by the owners of the said steam vessel "Three Friends," for the proper forthcom-

Wherefore they pray that they may be admitted to defend accordingly.

(Sgd.) MONTCALM BROWARD.
(Sgd.) N. B. BROWARD.

Sworn to and subscribed before me this 14th day of November, A. D. 1896.

[SEAL.] N. P. BRYAN,
Notary Public, State at Large.
J. M. BARRS,
Proctor for Libellant.

Claim filed Nov. 14, 1896. E. O. Locke, clerk. By Louis Starke, dpy. clerk.

7 *Claimants' petition for release of "Three Friends."*

In the United States district court for the southern district of Florida.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS," OF THE port of Jacksonville, her tackle and apparel.

In admiralty, libel of information for forfeiture of vessel for violation of neutrality laws, etc.

To the Honorable JAMES W. LOCKE,
Judge of the United States Court for the Southern District of Florida:

The petition of Napoleon B. Broward and Montcalm Broward respectfully shows:

First. That they, the said Napoleon B. Broward to the extent of $\frac{58}{60}$ and the said Montcalm Broward to the extent of $\frac{2}{60}$ are the sole and only owners of the vessel called the "Three Friends," of the port of Jacksonville, Florida.

Second. That said vessel lately, to wit, on the 17th day of September, 1896, at the port of Fernandina, Florida, was taken into custody by the Honorable B. L. Baltzell, collector of customs in and for the district and port of Fernandina, Florida.

Third. That on the 15th day of October, 1896, said vessel was in the custody of James McKay, United States marshal in and for the said district, under and by virtue of a process of attachment from the
8 said district court, said writ being a process of attachment for forfeiture, for violation of law, alleged in said libel as of the 2nd day of September, 1896, issued upon a libel of information in said court by Honorable Frank Clark, United States attorney for the southern district of Florida, and which is now pending in said court.

Fourth. That on the fifteenth day of October, 1896, your petitioners having filed their petition for an order directing the said United States marshal to deliver to them the said steam vessel "Three Friends" upon

their executing a bond to the said United States, in accordance with the statute in such case made and provided, did in pursuance of an order made by your honor make and file with the clerk of the court a good and sufficient bond, with two good and sufficient sureties, in the sum of seven thousand dollars ($7,000.00), conditioned to produce the said steam vessel "Three Friends," her engines, tackle, apparel, and furniture, etc., whenever the same may be required conformably to law, which said bond was duly procured as proscribed in and by your honor's said order.

Fifth. That upon the filing and approval of said bond the said steam vessel "Three Friends," her engines, tackle, apparel, and furniture, etc., were, under the provisions of and in compliance with your honor's said order, turned over and surrendered by the said James McKay, United States marshal, as aforesaid, to the custody and possession of your petitioners on the 15th day of October, 1896.

Sixth. That from the time of the delivery of the said steamer Three Friends to your petitioners down to about 7 o'clock p. m. on the 7th day of November, 1896, the said steam vessel "Three Friends" was used by your petitioners exclusively in their legitimate business of towing and wrecking upon and in the vicinity of the St. John's Bar, and the said steamer was being so used by your petitioners in the charge and command of Capt. Montcalm Broward, one of your petitioners, in her regular towing business on the St. John's Bar and the St. John's River when she was seized as hereinafter mentioned.

9 Seventh. That said vessel lately, to wit, on the 7th day of November, 1896, at the port of Jacksonville, Florida, while so in the custody of your petitioners, under the said order of the court, and engaged in her regular legitimate business of towing, was taken into custody by the Honorable C. R. Bisbee, collector of customs in and for the district and port of Jacksonville, Florida.

Eighth. That said vessel is now in the custody of the United States marshal, James McKay, in and for said district, under and by virtue of a process of attachment from the said district court in and for the southern district of Florida, said writ being a process of attachment for forfeiture, issued upon a libel of information in said court by Hons. Frank Clark and H. H. Buckman, attorneys of the United States for the southern district of Florida, charging violation of law, as of the 23rd day of May, 1896, and which is now pending in said court. That on account of said seizure your petitioners are compelled, at great expence to themselves, to charter another steamer to do the towing business of the steamer "Three Friends," but your petitioners are unable to obtain a steamer as well fitted for the towing business as is the steamer "Three Friends."

Ninth. Petitioners now come and pray your honor to order and direct the said James McKay, United States marshal as aforesaid, to deliver to them the said steam vessel "Three Friends," of the port of Jacksonville, Florida, together with all her tackle, apparel, and furniture, upon their executing a bond to the United States in accordance with the statutes in such cases made and provided.

Tenth. Petitioners now come and pray your honor to fix, on appraisement or otherwise, the amount of the proper bond to be given by the owners of the said steam vessel "Three Friends," for the proper forthcom-

ing of the said steam vessel "Three Friends," in case the judgment or decree of said court shall pass against the said claimants, to answer the said judgment of decree.

(Sgd.) MONTCALM BROWARD.
(Sgd.) N. B. BROWARD.

J. M. BARRS,
A. W. COCKRELL & SON,
Attorneys for said Owners.

Petition filed Nov. 14, /96.

EUGENE O. LOCKE, *Clerk.*

10 STATE OF FLORIDA,
Duval County:

Before me personally appeared Napoleon B. Broward and Montcalm Broward, to me well known, who, after being by me first duly sworn, say that they are the true and bona fide owners of the vessel called the "Three Friends," of the port of Jacksonville, Florida, above mentioned, and that no other person is the owner thereof.

MONTCALM BROWARD.
N. B. BROWARD.

Sworn to and subscribed before me this 14th day of November, A. D. 1896.

N. P. BRYAN,
Notary Public, State at Large.

(Indorsed:) In United States district court, southern district of Florida. In admiralty. The United States vs. Steamer "Three Friends." Petition. Filed Nov. 14th, 1896. Eugene O. Locke, clerk.

11 In the district court of the United States, southern district of Florida. In admiralty.

UNITED STATES)
vs.
STEAM VESSEL "THREE FRIENDS.")

Exceptions to libel.

Now comes N. B. Broward and Montcalm Broward, the owners of said steam vessel "Three Friends," and file the following exceptions and objections, severally, to the libel herein:

1. Sec. 5283, for an alleged violation of which the said vessel is sought to be forfeited, makes such forfeiture dependent upon the conviction of a person for doing the act or acts denounced in the first sentence of said section, and as a consequence of conviction of such person; whereas the allegations in said libel do not show what persons had been guilty of the acts therein denounced as unlawful.

2. The said libel does not show the "Three Friends" was fitted out and armed, attempted to be fitted out and armed, or procured to be fitted out and armed in violation of said section.

3. The said libel does not show the said vessel was so fitted out and armed, or so attempted to be fitted out and armed, or so procured to be fitted out and armed or furnished, with the intent that said vessel should be employed in the service of a foreign prince, or state, or of a colony, district, or people with whom the United States are at peace.

4. The said libel does not show by whom said vessel was so fitted out.

5. Said libel does not show in the service of what foreign prince, or state, or colony, or district, or body politic the said vessel was so fitted out.

12 6. The said libel does not show that said vessel was so armed or fitted out or furnished with the intent that such vessel should be employed in the service of any body politic recognized by or known to the United States as a body politic.

Wherefore, and for divers other grounds appearing on the face of said libel, it is prayed that said libel be dismissed.

A. W. COCKRELL & SON,
Proctors for the Owners.

(Indorsed:) In the district court of the United States, southern district of Florida. In admiralty. The United States vs. The steam vessel "Three Friends." Exceptions to libel. Filed Nov. 30th, 1896. Eugene O. Locke, clerk. A. W. Cockrell & Sons., proctors for owners "Three Friends."

13 District court of the United States, southern district of Florida.

THE UNITED STATES)
vs.
THE STEAM TUG THE "THREE FRIENDS.")

This vessel being under attachment and in custody of th' marshal under a libel for a violation of sec. 5283 of R. S., the claimant moves that they may be permitted to have an appraisement had and give bonds so as to obtain pos'session of the vessel pending the hearing of the cause. The district attorney opposes this motion, and cites in support of his opposition the case of the "Mary L. Hogan," decided by Judge Brown, of the S. district of New York, and reported in 17th F. R., 813. It is also contended that in case a vessel is libelled for a forfeiture no bond can be accepted, and refers to sec. 941, R. S.

The section referred to is only a limit upon the power of the marshal to stay admiralty process, and does not effect the action of the court whatever.

That the filing of a libel for forfeiture is such a declaration of a forfeiture, without even a preliminary examination or prima facie showing that the claimant has no right to give a bond for his property, pending a hearing, especially when the Government declares itself not ready for a hearing, is so repugnant to any idea of the right of private property and so declaratory of arbitrary confiscation that were it an open question it could no' be entertained. But it has been carefully considered and determined. Justice Story, in the case of "The Alligator" (1 Gall., 145), which was libel for forfeiture, in which case it was contended that the

court had no authority to deliver the property on bond in a case of this nature, says:

14 "I understand that in all proper cases of seizure, under whatever statute made, the invariable practice in the district court has been to take bond for the property whenever application has been made by the claimant for the purpose.

"No doubt has hitherto existed respecting the right of that court to take such bonds. * * * That practice, I understand, has been recognized and sanctioned by my predecessors in this court, and I should not now feel at liberty to disturb, upon slight grounds, a practice so well settled, whatever might be my own impressions as to its regularity. The practice has been of great public convenience, and to claimants in particular it has been peculiarly beneficial. * * * Whether there be any statute existing which authorized the delivery on bond or not is not, in my judgment, material. The cause was civil cause of admiralty and maritime jurisdiction, and nothing can be better settled than that the admiralty may take fidejussory caution of stipulation in case in rem, and may in a summary manner award judgment and execution there. The district court possessing this jurisdiction and being fully authorized to adopt the process and modes of proceeding of the admiralty * * had an undoubted right to deliver the property on bail and to enforce a conformity to the terms of the bailment."

This I consider is the well-established law upon the subject, and I have failed to find any case where it has been questioned.

In the case of the "Mary L. Hogan" this general law was not questioned, but it was held to be within the discretion of the court to grant or deny a release on bond according to the circumstances of the case, and while I concur fully in the views of the learned judge in that case I consider that the circumstances of this case differ so materially that a different conclusion may well be reached. In that case the seizure was made immediately after the fitting out and while preparing to

15 leave, and when the motion was heard she was fully prepared to proceed on her alleged illegal voyage, and all circumstances pointed clearly to the conclusion that if released she would proceed. In this case the libel charges a past offence, several months prior to the seizure, and there is nothing to show, nor is there any intimation, but that at the time of seizure she was engaged in the legitimate prosecution of her regular business of towing on the St. Johns River.

The case of the "Hogan" at the time of that decision was ready for a hearing and immediate determination; in this case exceptions to the libel have been filed raising important questions of law, on which the Government is not ready for argument, and the consideration of which may cause more or less delay in the trial.

There is no suggestion, intimation, or reason to believe that if released on bond this vessel would attempt any violation of law.

Under the circumstances it is considered that the case does not present such un'sual features as to call for an exceptional ruling upon the question of admitting to bail, and it is ordered that upon an appraisement being had said claimants be permitted to enter in bond and stipulation as by law provided for the release of vessels under attachment.

J. W. LOCKE, *Judge.*

Filed Dec. 3, 1896. E. O. Locke, clerk.

16 In the district court, southern district of Florida.

IN RE THE STEAMER "THREE FRIENDS," &c. } Violation of sec. 5283, R. S.

The petition of claimants for appointment of appraisers and authority to give bond for said steamer, being presented, argued, and considered, it is ordered that A. D. Stevens and W. B. Watson are appointed to appraise the value of said steamer "Three Friends," her tackle, apparel, and furniture, having regard to the amount for which in their judgment said steamer, her tackle, apparel, and furniture would be sold on order of this court for cash at public outcry, and report their appraisement by filing their report with the clerk of this court.

It is further ordered that upon the execution and filing of a bond comformably to the statute with the claimant as principals and with sureties, the solvency and sufficiency of which shall be approved by E. O. Locke, clerk of this court, specially designated for that purpose, the said bond being in the sum fixed by said appraisers as the value of said steamer in their report and conditioned for the payment of such amount in the event that upon a final hearing the court shall decree said steamer to be forfeited, the marshal for the southern district of Florida shall turn over and surrender the custody and possession of the said steamer "Three Friends," her tackle, apparel, and furniture now in his hands to the said Napoleon B. Broward and Montealm Broward, claimants.

Done and ordered this third day of December, A. D. 1897.

JAMES W. LOCKE, *Judge.*

(Endorsed:) U. S. dist. court so. dist. Fla. United States vs. Str. "Three Friends." Violation sec. 5283, R. S. Order for appraisement and bond. Filed Dec. 3rd, 1896. E. O. Locke, clerk. L. Starke, dep. clerk.

17 United States district court, southern district of Florida.

UNITED STATES
vs.
STR. "THREE FRIENDS."

A. D. Stevens and W. B. Watson having been appointed to appraise the value of said vessel, her tackle, apparel, and furniture, etc., do hereby solemnly swear that they will well and faithfully appraise the value of such property and true return make thereon to said court.

A. D. STEVENS.
W. B. WATSON.

Sworn to and subscribed before me this 3rd December, 1896.

EUGENE O. LOCKE, *Clerk.*

(Endorsed:) U. S. district court, southern district of Florida. United States vs. S. S. "Three Friends." Oath of appraisers. Filed Dec. 3rd, 1896. Eugene O. Locke, clerk.

18 In the district court, southern district of Florida.

IN RE THE STEAMER "THREE FRIENDS," &C. } Violation of sec. 5283, R. S.

The undersigned, appraisers appointed by the order of this court December 3rd, 1896, respectfully report that they have appraised the value of the said steamer "Three Friends," her tackle, apparel, and furniture, having regard for the amount for which, in their judgment, said steamer, her tackle, apparel, and furniture would be sold on order of this court for cash at public outcry, and hereby respectfully report that they have so appraised said steamer "Three Friends," her tackle, apparel, and furniture, at four thousand 00/100 dollars, and file this as their report, this 4th day of December, 1896.

A. D. STEVENS,
W. B. WATSON,
Appraisers.

(Endorsed:) U. S. dist. ct., so. dist. Fla. United States vs. Str. "Three Friends." Appraisers' report. $4,000.00. Filed Dec. 4th, 1896. E. O. Locke, clerk.

19 In the United States district court, southern district of Florida.

The United States vs. the steamer "Three Friends." Violation of section 5283, Revised Statutes.

Know all men by these presents that we, Napoleon B. Broward, Montcalm Broward, and the Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, are held and firmly bound unto the United States in the sum of ten thousand ($10,000) dollars, lawful money of the United States, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 7th day of December, 1896. The condition of this obligation is such that whereas a libel is now pending in the United States district court for the southern district of Florida at the suit of the United States against the steam vessel "Three Friends," her tackle, apparel, and furniture, whereof the said N. B. Broward and Montcalm Broward are claimants, and the said claimants having prayed that the said vessel, her tackle, apparel, and furniture shall be delivered to them on the execution of a bond to the United States for the payment of the appraised value of said steamer, her tackle, apparel, and furniture, which value has been duly appraised at ten thousand dollars. Now, if the said Napoleon B. Broward and the said Montcalm Broward shall well and truly pay to the United States the said amount of ten thousand dollars in case the decree of said court shall pass against them to that effect, then this obligation shall be void, otherwise to remain in full force and virtue.

NAPOLEAN B. BROWARD. [SEAL.]
MONTCALM BROWARD. [SEAL.]
FIDELITY & DEPOSIT CO. OF MARYLAND. [SEAL.]
By D. U. FLETCHER,
Attorney in Fact.

Signed, sealed, and delivered in presence of us—
As to Browards:
J. M. BARRS.
N. P. BRYAN.
As to F. & D. Co:
JNO. W. DODGE.
CAROLINE HARDING.
Attest:
SAM'L J. SLATER, Jr.,
Agent for the Company.

Approved Dec. 7th, 1896.

EUGENE O. LOCKE, *Clerk.*

(Indorsed:) # 131 O. L., 7. United States vs. S. S. "Three Friends." Bond. Filed Dec. 7th, 1896. Eugene O. Locke, clerk.

20 United States district court, southern district of Florida.

On Monday, December 28th, 1896, this cause came on to be heard before said court upon exceptions to libel.

Present: Honorable James W. Locke, judge; both parties being represented by counsel.

And the exceptions herein being fully argued, both libellant and respondent, and the same are submitted to the court, and decision is reserved.

Afterward, to wit, upon consideration thereof, parties being present, by counsel, it is decreed as follows:

21 District court of the United States, southern district of Florida.

THE UNITED STATES
vs.
THE STEAMBOAT "THREE FRIENDS." } Libel for forfeiture.

This cause coming on to be heard upon exceptions to the libel and having been fully heard and considered, it is ordered that said second, third, fifth, and sixth exceptions be sustained and that the libellant have permission to amend said libel, and in event said libel is not so amended within ten days the same stand dismissed and the bond herein filed be canceled.

JAMES W. LOCKE, *Judge.*

JACKSONVILLE, FLA.,
January 18, 1897.

(Endorsed:) District court. United States vs. Str. "Three Friends." Decree sustaining exceptions to libel. Filed Jan. 18, 1897. E. O. Locke, clerk.

22 In the district court of the United States for the southern district of Florida. In admiralty.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS." } Libel of information for forfeiture.

To A. W. COCKRELL & SONS and J. M. BARRS,
Proctors for Claimants and Appellees.

SIRS: Please take notice that the libellants herein hereby appeal from the final decree made and entered herein on the eighteenth day of January, A. D. 1897, to the United States circuit court of appeals for the fifth circuit to be holden in and for said circuit at the city of New Orleans, Louis'ana.

This twenty-third day of January, A. D. 1897.

FRANK CLARK,
United States Attorney for the Southern District of Florida,
Proctor for the Libellants.

CROWELL GIBBONS,
Asst. U. S. Atty. and Proctor for Libellants.

Service of the above notice of appeal is hereby accepted this January 23rd, 1897.

A. W. COCKRELL & SON,
Proctors for Claimants and Appellees.

(Endorsed:) Dist. ct. of the U. S. for the so. dist. Fla. In admiralty. The United States vs. The Steam Vessel "Three Friends." Notice of appeal filed Jan. 23rd, 1897. E. O. Locke, clerk. By Louis Starke, depy. clerk.

23 United States district court, southern district of Florida.

THE UNITED STATES
vs.
THE STEAM VESSEL "THREE FRIENDS." } Libel of information for forfeiture.

Assignment of errors.

The libellants hereby assign errors in the ruling and proceeding of the district court herein, as follows:

First. For that the court over the objection of the libellants allowed the said steam vessel "Three Friends" to be released from custody upon the giving of bond.

Second. For that the court erred in sustaining the 2nd, 3rd, 5th, and 6th exceptions of the claimants to the libel of information of the libellants.

Third. For that the court erred in entering a decree dismissing the libel of information herein.

Jacksonville, Florida, January 23rd, A. D. 1897.

FRANK CLARK,
United States Attorney for the Southern District of Florida,

CROMWELL GIBBONS,
Asst. United States Attorney for the Southern District of Florida,
Proctors for Libellants.

(Endorsed:) In the district court of the U. S. for the so. dist. of Fla. In admiralty. The United States vs. The Steam Vessel "Three Friends." Assignment of errors. Filed Jan. 23rd. E. O. Locke, clerk. By Louis Starke, depy. clerk.

24 United States district court southern district of Florida.

UNITED STATES
v.
THE STEAM VESSEL "THREE FRIENDS." } Libel of information for forfeiture.

To the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The petition of the United States of America respectfully shows to the court:

That on the 12th day of November, A. D. 1896, the libellants filed a libel of information in the United States district court for the southern district of Florida against the said steam vessel "Three Friends," praying that for the reasons set forth in said libel that the said steam vessel "Three Friends," her tackle, apparel, and furniture might be condemned by the definitive sentence and decree of said court as forfeited to the use of the said United States.

That upon the filing of the said libel of information an attachment and monition were issued by the clerk of said court in due form and said steam vessel "Three Friends" was taken into the custody of the court by the marshal of the southern district of Florida thereunder.

That thereafter, to wit, on the 14th day of November, A. D. 1896, one Montcalm Broward and N. B. Broward appeared in the said suit and
25 made claim as owners of the said steam vessel "Three Friends," and at the same time filed in said court their petition praying that an appraisment of said vessel might be had and they, the said claimants, allowed to give bond for the release of said steam vessel from custody.

That thereafter, to wit, on the 30th day of November, A. D. 1896, the said claimants filed in said court their exceptions to the libel of information filed by your petitioners, praying that said libel of information might be dismissed for the causes therein set forth.

That thereafter, to wit, on the 3rd day of December, A. D. 1896, the judge of said court issued an order allowing the petition of said claimants, appointing appraisers, and granting bail over and against the objection of your petitioners.

That thereafter, to wit, on the 18th day of January, in the year 1897, issue having been joined upon the exceptions of the claimants to the libel of information of your petitioners, the same came on to be heard, the Honorable James W. Locke, judge of the said court, and such proceed-

ings were thereupon had; that on the 18th day of January, A. D. 1897, the judge pronounced in favor of and sustained the 2nd, 3rd, 5th, and 6th exceptions of the said claimants to the libel of information of your petitioners, and thereupon caused to be entered a decree dismissing petitioner's libel of information.

That your petitioners are advised and insist that the order of the honorable district court allowing bail for said vessel entered therein on the 3rd day of December, A. D. 1896, is erroneous, in that bail can not be allowed in proceedings for the absolute forfeiture of vessels.

That your petitioner is advised and insists that said decree dismissing petitioner's libel of information is erroneous, in that it sustains the 2nd, 3rd, 5th, and 6th exceptions of the claimants to petitioner's libel
26 of information. For this and other reasons your petitioners appeal from the said final decree to the United States circuit court of appeals for the fifth circuit, and on said appeal intends to secure a new decision on the law upon the pleadings in said district court, and to that end prays that the records and proceedings of said court may be returned to the United States circuit court of appeals for the fifth circuit, and that the said decree may be reversed and the libel of information be sustained with costs in the district court and in this court.

This 23rd day of January, A. D. 1897, at Jacksonville, Florida.

FRANK CLARK,
United States Attorney for the Southern District of Florida,
Proctor for Libellants.

CROMWELL GIBBONS,
Asst. United States Atty. for Southern District of Florida, and
Proctors for Appellants.

The foregoing appeal is hereby allowed.
Jacksonville, Florida, January 23rd, A. D. 1897.

JAMES W. LOCKE, *Judge.*

(Endorsed:) In the district court of the United States for the So. Dist. Fla. In admiralty. The United States vs. The Steam Vessel "Three Friends." Petition of Appeal. Filed Jan. 23rd, 1897. E. O. Locke, clerk. By Louis Starke, depy. clerk.

27 *Opinion.*

District court of the United States, southern district of Florida.

THE UNITED STATES
vs.
THE STEAMER "THREE FRIENDS." } Forfeiture.

This vessel has been libeled for forfeiture under the provisions of the section 5283 of the Revised Statutes of the United States.

The libel alleges that said steam vessel was on the 23rd day of May, A. D. 1896, furnished, fitted, and armed "with intent that she should be employed by certain insurgents or persons in the Island of Cuba to cruise or commit hostilities against the subjects, citizens, or property of the said

Island of Cuba and against the King of Spain and the subjects, citizens, and property of the said King of Spain in the Island of Cuba, with whom the United States are and were at that date at peace."

To this there have been exceptions filed upon two grounds:

1st. That forfeiture under this section depends upon the conviction of a person or persons for doing the acts denounced; and

2nd. That the libel does not show that the vessel was armed or fitted out with the intention that she should be employed in the service of a foreign prince or state, or of any colony, district, or people recognized or known to the United States as a body politic.

The first objection raised by these exceptions is easily disposed of
28 by the language of the Supreme Court in the case of the "Palmyra" 12 Wheaton, 1, where, after elaborate argument, it is said:

"Many cases exist, when the forfeiture for acts done attaches solely in rem and there is no accompanying penalty in personam; many cases exist where there is both a forfeiture in rem and a personal penalty; but in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding in rem stands independent and wholly unaffected by any criminal proceeding in personam." * * *

"In the judgment of this court no personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature."

The other question raised by the exceptions is more difficult and requires a construction of the clause of the section 5283, "with intent that such vessel should be employed in the service of any foreign prince or state, or of any colony, district, or people," and more particularly the significance of the words "colony, district, or people," and a determination whether the requirements of the law are satisfied by the allegations of the libel that the vessel was intended to be employed "in the service of certain insurgents or persons in the Island of Cuba," and whether the statute admits a construction which would make a vessel liable to forfeiture when fitted out for the intended employment of any one or more persons not recognized as a political power by the Executive of our nation.

The section under which this libel has been filed was originally the third section of the act of June 5, 1794, I Stat., 281, c. 50, and the lan-
29 guage at that time only contained the provision that the vessel should be fitted out with intent that said vessel should be employed in the service of any foreign prince or state to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state with whom the United States might be at peace.

While that was the language of the act, the question came before the Supreme Court in the case of Gelston vs. Hoyt, 3d Wheaton, 328, and, in speaking of a plea considered necessary for a defense to a suit for damages for a seizure under this statute, it was held that such plea was bad, "because it does not aver the Governments of Petion and Christophe are foreign States which have been duly recognized as such by the Government of the United States."

In this case there was no distinction made between the party in whose service the vessel was to be employed and the one against whom hostilities were intended, and the language of the court would fully justify the

conclusion they should both have been recognized, either as princes or States.

Subsequently, as is stated by Mr. Wharton in his work on international law, upon the outbreak of war between the South American colonies and Spain, upon a special message of the President to Congress upon the subject, the words "or of any colony, district, or people" were added to the description of both parties contemplated—both that one into whose employment the vessel was to enter and that one against whom the hostilities were contemplated.

Has the addition of these words changed the character of the party intending to employ such vessel from that of a political power
30 duly recognized as such, as is declared by the court in Gelston vs. Hoyt, to that of a collection of individuals without any recognized political position? This question has been before the courts frequently, and several times been examined and commented upon, but in no case which I have been able to find has it been so presented, unconnected with questions of fact, that there has been a ruling upon it so that it can be considered as final and conclusive.

Beyond question the courts are bound by the actions of the political branch of the Government in the recognition of the political character and relations of foreign nations, and of the conditions of peace or war.

The act of 1794, as well as its modification, the act of 1818, used the same language in describing the power or party in whose behalf or into whose service the vessel was intended to enter as was used in describing the political power against which it is intended that hostilities should be committed; and as far as the language itself goes it is impossible to say that in using the words in one clause of the sentence the political character and power was intended, while in another clause of the same sentence words used in exactly the same connection and with apparently the same force and meaning were intended to represent not the political power but the individuals of a certain colony, district, or people.

It is contended that although the original act of 1794 required the construction given it in Gelston vs. Hoyt, that each party should be one duly recognized by the United States, yet the modification of 1818 so changed it that it should be held to apply to any persons, regardless of their political character, for whose service a vessel might be intended.
31 It is understood that this modification was brought about by the special message of President Madison of December 26, 1816. The question presented by this message is clearly set forth in the language used. He says: "It is found that the existing laws have not the efficacy necessary to prevent violations of the United States as a nation at peace toward belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States."

In further explanation of the condition of affairs which called for this modification of this statute may be considered the letter of Mr. Monroe, Secretary of State, to Mr. Forsythe, January 10, 1817, in which he speaks of vessels going out as merchant vessels and hoisting the flag of some of the belligerents and cruised under it, of other vessels armed and equipped in our ports hoisting such flags after getting out to sea, and of vessels having taken on board citizens of the United States who, upon

the arrival at neutral points, have assumed the character of officers and soldiers in the service of some of the parties in the contest then prevailing. All of this correspondence shows that the effort at that time was to enforce neutrality between recognized and belligerent parties. That the parties then in contest were recognized as belligerents and a neutrality was sought to be preserved is clearly shown by the first annual message of President Monroe in 1817. He says: "Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war."

32 "They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights. Our ports have been opened to both, and any articles * * * * that either was permitted to take has been equally free to the other."

It is considered that this shows what was in contemplation at the time of the enactment of the law of 1818, and that what was intended was to prevent the fitting out of vessels to be employed in the service of a colony, district, or people, which had been recognized as belligerents, but which had not been recognized as an independent State, or which was not represented in the political world by a prince.

There appears to be nothing in the remedy demanded at that time, or in the language used, to show that the words so added were intended to represent or be construed as referring to the individual people of any colony, district, or people, or any number of them however designated, except as in their collective representative political capacity, any more than there is to show that the term State in the original was intended to refer to the individual people of the State.

The language of the foreign enlistment act of Great Britain, 59 George III, c. 69, 7, leaves no question as to the intention of Parliament in that legislation, as it added to the words of our statute the words, "or part of any province or people or of any person exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or parts of any province or people."

33 In order to give the statute under which this libel is brought the force contended for by the libellant, it is necessary to eliminate from the provision that makes it necessary to declare how the vessel is to be employed the entire clause "in the service of any foreign prince or State, or of any colony, district, or people," or to read into it the language found in the act of Great Britain, or its equivalent. That it was the general understanding at the time of the passage of the original act that it was considered to apply only to duly recognized nations is shown by the fact that, in the case of the United States vs. Guinet, 2 Dall., 321, under this same section—the first case brought under it—the indictment alleged fully in terms that both the State of the Republic of France, in whose service the vessel was to be employed, and the King of Great Britain were a State and a prince with whom the United States was at peace.

In the case of the United States vs. Quincy, C. Pet., 445, the Supreme Court says that the word people was used in this statute as simply descriptive of the power in whose service the vessel was intended to be employed,

and is one of the denominations applied by the acts of Congress to a foreign power.

In the case of the Meteor, F. C., 9 498, where the original libel alleged that the vessel was fitted out with the intent that she should be employed in the service of certain persons to commit hostilities against the Government of Spain, it was considered necessary to amend it by alleging that she was intended to be employed by the Government of Chili; and in that case there was presented a certificate of the Secretary of
34 State, under seal, of the fact of the war existing between Spain and Chili, and that they were both nations with whom the United States were at peace.

In addition to the declaration of the Supreme Court in the cases of Gelston vs. Hoyt, and the United States vs. Quincy, this question has been incidentally under examination in several cases in the lower courts. In the case of the Caromdelet, 37 F. R., 800, Judge Brown says: "Section 5283 is designed in general to secure our neutrality between foreign belligerent powers. But there can be no obligation of neutrality except towards some recognized state or power, de jure or de facto. Neutrality presupposes two belligerents, at least, and as respects any recognition of belligerency—i. e., of belligerent rights—the judiciary must follow the executive. To fall within the statute, the vessel must be intended to be employed in the service of one foreign prince, state, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of another with which the United States are at peace. The United States can hardly be said to be at peace, in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising or committing of hostilities against such a mere faction well be said to be committing hostilities against the subjects, citizens, or property of a district or people within the meaning of the statute. So, on the other hand, a vessel in entering the service of the opposite faction of Hippolyte, could hardly be said to enter the service of a foreign prince or state, or of a colony, district, or people, unless our Government had recognized Hippolyte's faction as at
35 least constituting a belligerent, which it does not appear to have done."

In the case of the Conserva, 38 F. R., 481, a case in which it was alleged the vessel was to be used in a contest between Legitime and Hippolyte, Judge Benedict says: "The libel in this case charges certain facts to have been done in connection with the vessel with the intention that the vessel be employed in the service of certain rebels in a state of insurrection against the organized and recognized Government of Hayti, to cruise and commit hostilities against the subjects, citizens, or property of the Republic of Hayti, with whom the United States are at peace. A violation of the neutrality which the United States is obliged to maintain between the rebels mentioned and the Government of the Republic of Hayti is the gravamen of the charge. But the evidence fails to show a state of facts from which the court concluded that the United States was ever under any obligation of neutrality to the rebels mentioned, or is now under any obligation of neutrality to the Government of the Republic of Hayti."

In the case of the United States vs. Trumbull, 48 F. R., 99, Judge Ross (48 F. R., 99) carefully reviews the different authorities, examines the question, and clearly indicates how he would have decided the question had it been necessary for the purposes of deciding the case before. He says: "Does section 5283 of the Revised Statutes apply to any people whom it is optional with the United States to treat as pirates? That section is found in the chapter headed "Neutrality," and it was carried into the Revised Statutes, and was originally enacted
36 in furtherance of the obligations of the nation as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike; and it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other."

In speaking of the case of the United States vs. Quincy, in which it was said that the word "people" "was one of the denominations applied by the act of Congress to a foreign power," he says: "This can hardly mean an association of people in no way recognized by the United States or by the Government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as pirates."

In the case of the United States vs. The Itata, 56 F. R., 505, on appeal before the circuit court of appeals, the question was fully and carefully considered in an elaborate opinion, and although not found necessary to decide the question in this case, as the case was disposed of upon other grounds, it is considered to be apparent how the question would have been decided had it been necessary. The force of the word "people," as used in this statute, is carefully examined, as well as all other questions, and it is considered that the force of the conclusion which must necessarily result from such investigations can not be avoided.

In the case of the United States vs. Hart et al., Judge Brown expresses his view of this section by saying: "Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with whom we are at peace."
37 The same language is used by the court in the case of the United States vs. Wiborg, 163 U. S., 632, but it is contended in behalf of the libelant that this language was modified by the subsequent declaration made in the same case, that the operation of this statute is not necessarily dependent on the existence of such state of belligerency. In using the latter language it would seem that the court had the entire statute under contemplation, and more particularly sec. 5286, R. S., the sixth section of the original act, which plainly does not depend upon a state of belligerency or neutrality. This was the section then under consideration, as the immediate context and following sentence shows, and was the section upon which the suit was based; and it can not be considered that this language was intended to apply to another section the consideration of which was in no way called in question.

With this understanding of the language in this case, in that case, every judicial decision, remark, or ruling, where the question has been under consideration or examination, appears to be in favor of the position taken by the claimants in the exceptions.

In the case of the "Mary N. Hogan," 18 F. R., 529, and in the cases of the intended charge of that vessel, boxes of arms, and ammunition (20

F. R., 50), it does not appear that this question was raised by the claimant or considered by the learned judge; and his language in the subsequent case of the "Carondelet," where it was raised and discussed, may be accepted as presumptive proof of what his decision would have been, had it been so considered.

The same is true of the case of the "City of Mexico," 28 F. R., 148, decided by me in this court. In that case the defense was upon
38 entirely different grounds, and the force of the portion of the statute contended for, the necessity that there should be an intent not only that the vessel should intend to commit hostilities, but that for such purposes she should be employed in the service of some political power, was entirely lost sight of and eliminated from the consideration of the case.

The only expression authoritatively given which I have been able to find opposed to the view of the claimant in his exceptions is that of a portion of the letter of the honorable Attorney-General to the Secretary of State, of December 16, 1869, 13 Op. Atty. Gen., 177, and cited in the case of United States vs. Wiborg. I do not consider that I should be doing myself justice to pass that by unnoticed, as it has raised more question in my mind and called for and compelled more thought and consideration than anything else connected with the case; but I feel compelled to reach a different conclusion than is there expressed.

The general purpose and intent of that letter was to declare that the insurrection in Cuba was not a fitting opportunity to enforce the provisions of this law, inasmuch as we owed no duty to such insurgents to protect them from hostilities, or rather that any contest between Spain and such insurgents could not be considered as hostilities, but incidentally it was stated that a condition of belligerency was not necessary for the operation of this statute.

It could not be considered that we owed such insurgents no such duty because we were not at peace with them, but because we had never recognized them as a colony, district, or people.

39 The force and effect of the letter was that the Cuban insurgents had not been recognized as a colony, district, or people, and therefore this section did not apply. If they had not been then so recognized or were not entitled to be so recognized, how can they now be so recognized or described as to come within terms of the statute in question?

It is considered that the argument used in such letter to show that the statute should be held applicable to cases where there was no condition of belligerency and but one political power recognized, would have been fully as applicable under the old law, when the case of Gelston vs. Hoyt decided to the contrary.

The fact that a vessel was fitted out to be employed in the service of a prince would not necessarily imply that such prince was a political power recognized by the United States any more than would the terms a "colony, district, or people," under the act of 1818. But the Supreme Court clearly held in that case that it must be alleged that such prince or State has been recognized as such by the United States. The same argument used therein would call for the application of this statute for the forfeiting of any vessel fitted out to be employed by any person, individual, corporation, or firm, for the purpose of committing hostilities against a State at peace, which would plainly not come within the pro-

visions of the statute, however much it might be considered international policy or proper national conduct.

It is impossible in my view of the construction required by the language used to properly apply the term a people, used in the connection
40 in which it is found, to any persons few in number and occupying a small territory with no recognized political organization, although they might procure the fitting out and arming of a vessel. I fail to find any ground for giving this statute, a criminal one as it is, any but its ordinary application. The question presented is clear and distinct, are "certain insurgents or persons in the Island of Cuba" properly described by either of the terms a "colony," a district, or a people, and if so, which? The inconveniences which might arise from the political branch of our Government recognizing such insurgents as a colony, district, or people having political existence and as belligerents can not be considered in determining whether they are entitled to such description.

This statute is a criminal and penal one, and is not to be enlarged beyond what the language clearly expresses as being intended. It is not the privilege of courts to construe such statutes according to the emergency of the occasion, or according to temporary questions of policy, but according to the principles considered to have been established by a line of judicial decisions.

It is contended that if the principles embodied in the exceptions are declared to be the law, there can be no law for the prevention of the fitting out of armed and hostile vessels to stir up insurrections and commit hostilities against nations with which we are at peace, and that such conclusion would make the parties engaged in any such expedition liable to prosecution as pirates.

To the first of these points it is considered that section 5286 is,
41 as has been constantly held, intended to prevent any such expeditions, regardless of the character of the parties in whose behalf they were organized, the only distinction being that in that case it is necessary to bring a criminal suit and prove overt acts, while under this portion of this section the intent is the gravamen of the charge and the prosecution is against the vessel, regardless of the persons engaged in the fitting out or the ignorance or innocence of the owners.

This is not a case that can be or should be determined upon questions of public policy, and whether any parties subject themselves to prosecution for piracy or not should have no weight in its consideration. If they should be so subject they would have the benefit of the necessity of proving piratical acts rather than intentions.

It is certainly considered to be true that any such parties would be considered as pirates by Spain, and would be treated as such if found in any acts of hostility, regardless of any recognition this nation might give them by considering them as having any political character as a people.

Without attempting further argument, but regretting that the pressing duties of a very busy term of jury trials have prevented a fuller and more complete expression of my views, it is my conclusion that the line of judicial decisions demands that a construction should be put upon the section in question which would hold that it was the intention of Congress in such enactment to prevent recognized political powers from
42 having vessels prepared for their service in the United States, but that it was not the intention to extend such prohibition to vessels

fitted out to be employed by individuals or private parties, however they might be designated, for piratical or other hostilities where no protection could be obtained by a commission from a recognized Government. In such case they would be held liable under the section which provides for the fitting out of a military expedition, or if they were guilty of any piratical acts upon the high seas they would become liable under the laws for the punishment of such acts. It is considered that at the time of the amendment of 1818 this construction had been declared, and the language of the amendment was in no way intended to change such construction, but was only intended to apply to the new designation of political powers the existence of which had been recognized as belligerents if not as independents, and who were entitled to the rights of neutrals; that the libel herein does not state such a case as is contemplated by the statute, in that it does not allege that said vessel had been fitted out with intent that she be employed in the service of any foreign prince or State, or of any colony, district, or people recognized as such by the political power of the United States, and unless it can be so amended should be dismissed, and it is so ordered.

43 * * * * * *

Since writing the foregoing, the libel herein has been amended by inserting in place of "by certain insurgents or persons in the Island of Cuba," the words "in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain in the Island of Cuba," but it is considered that the objection to the libel in sustaining the exceptions has not been overcome, but that although the language has been somewhat changed, the substance has not been amended in the material part, inasmuch as it appears clearly that the word people is used in an individual and personal sense, and not as an organized and recognized political power in any way corresponding to a state, prince, colony, or district, and can in no way change my conclusion heretofore expressed, and the libel must be dismissed.

By LOCKE,
District Judge.

44 United States district court, southern district of Florida. In admiralty.

I, Eugene O. Locke, clerk of said court, hereby certify that the foregoing document of 43 pages is a true copy of the record in the case of—

THE UNITED STATES
vs.
THE S. S. "THREE FRIENDS." } Forfeiture # 281,

lately adjudicated in said court, as appears from the records and files in my office.

In testimony whereof I hereunto set my hand and the seal of said court at Jacksonville, in said district, this January the twenty-sixth, A. D. 1897.

[SEAL.] EUGENE O. LOCKE, *Clerk.*

(Indorsed on cover:) U. S. district court, southern district of Florida, # 281, United States vs. S. S. "Three Friends," etc. Apostles.

165-721.
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165-721

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE STEAMSHIP "THREE FRIENDS," her boats, tackle, etc.
No. —.

PETITION FOR WRIT OF CERTIORARI.

Cranger v. Mackie, Ottawa 146 U.S. 357

The Kate 166 U.S. 458, 459

Snyder v. U.S. 112 U.S. 210

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE STEAMSHIP "THREE FRIENDS," her boats, tackle, etc.
No. —.

PETITION FOR WRIT OF CERTIORARI.

This is a proceeding in admiralty for a forfeiture brought in the southern district of Florida under Revised Statutes, section 5283. Exceptions to the libel were sustained by Judge Locke. An appeal has been perfected from his decision, and the cause is now pending in the circuit court of appeals for the fifth circuit.

The question involved in this cause is whether the words "colony, district, or people" in the section aforesaid are confined in application to political bodies whose belligerency has been formally recognized; the *Three Friends* having been fitted out and armed in aid of the present insurrection in the Island of Cuba, which insurrection is sufficiently notorious and extensive to have received the attention of the Government of this country

for nearly two years past, although the insurgents have not received any recognition of belligerency—of all which the courts take judicial notice.

This section has been applied to expeditions in aid of insurrections of much less magnitude and importance in the cases of the *Mary N. Hogan* (18 Fed. Rep., 529), and the *City of Mexico* (28 Fed. Rep., 148). Subsequently the question was raised in various of the lower courts whether the section was applicable when belligerency had not been recognized. It has been much discussed and regarded as very doubtful. It seems never to have been both discussed and decided until the present decision of Judge Locke. The question was presented to this court upon application for a writ of *certiorari* in the case of the *United States* v. *The Steamship Itata*, at October Term, 1892. That vessel when seized was engaged in an expedition on behalf of the so-called legislative party in Chile during the war of 1891, said party having received no recognition of belligerency from this Government. The petition was "denied without prejudice" on October 31, 1892 (149 U. S., 789). The case was decided upon other grounds by the circuit court of appeals on May 8, 1893. (15 U. S. App., 1.) The war then being long since over, and the so-called legislative party being the recognized government of Chile, no further attempt was made to obtain a writ of *certiorari*, and for this reason the question has never been decided by the Supreme Court.

The opinion of Judge Locke is partly based upon misinformation as to the history of the phrase "colony, district, or people," which he understands to have been

inserted in the statute in order to avoid the effect of the decision in *Gelston* v. *Hoyt* (3 Wheat., 246), decided at February Term, 1818, after the belligerency of the main South American colonies was formally recognized by the message of President Monroe on December 5, 1817. The words in question, however, were first inserted in this branch of our legislation by the act of March 3, 1817, c. 58, as pointed out in *The Meteor*, 17 Fed. Cas., at p. 200. At that time the belligerency of the Spanish American colonies had not been formally recognized; and whether their belligerency had been informally recognized thereafter remained a disputed question, Monroe's opinion being in the affirmative, Clay's in the negative, while Wirt regarded the question as one in doubt. Arguments drawn from the history of the times tend strongly to the conclusion that recognition of belligerency, technically so called, is entirely immaterial to the legislation now under consideration, and this conclusion, as is believed, is confirmed by careful analysis of the statute itself.

The question is a very important one, since if the section under consideration is not applicable to such expeditions in support of the present Cuban insurrection these expeditions are piratical in character and prosecutions should be instituted under other provisions of the Revised Statutes.

The question, moreover, is of especial importance, because it arises likewise under section 5282 of the Revised Statutes and elsewhere.

Unlawful expeditions in aid of the Cuban insurrectionists, endangering the honor and dignity of the United

States, are continually in preparation, and it is of great importance that the construction of the statutes intended to preserve the neutral and pacific relations of the United States should be settled as early as possible.

For these reasons the Secretary of State has requested that an application be made at once for a writ of *certiorari* to review the decision of the circuit court.

The Attorney-General, concurring in this opinion, and believing the present to be one of the exceptional cases which warrant the issuance of such a writ without awaiting the decision of the lower appellate court, respectfully presents this application. The certified transcript of record is presented herewith. Notice of the application has been duly given to counsel for the respondent, and proof thereof filed; and notice has also been given that if this application be granted the Attorney-General will forthwith without further notice move that the cause be advanced and set for argument upon the earliest possible day.

JUDSON HARMON,
Attorney-General.

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Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

THE UNITED STATES, Appellant,

VS.

THE STEAMER "THREE FRIENDS," &c.

On Petition of the United States for the Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

LIBELS, SENTENCES, AND OPINIONS IN CASES OF CONDEMNATION UNDER SECTION 5283.

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UNITED STATES VS. STEAM TUG MARY N. HOGAN.

District Court of the United States for the Southern District of New York.

Of July Term in the year 1883.

Before the Honorable ADDISON BROWN, District Judge.

On the 20th day of July, 1883, comes Elihu Root, Attorney of the United States for the Southern District of New York, who prosecutes here for the United States in its behalf in a cause of seizure and forfeiture, civil and maritime, in which the said United States are concerned and informs the court.

That the United States brings suit herein against a certain vessel, the steam-tug Mary N. Hogen, her tackle, apparel and furniture together with all material, arms, ammunition and stores which may have been procured for the building and equipment thereof, for breach of the neutrality laws of the United States and alleges as follows:

First. That the said vessel is now lying at the port of New York in waters navigable from the sea, by vessels of the burden of ten tons and upwards, within the Southern District of New York and within the jurisdiction of this court and is ready to sail for certain places to the said attorney of the United States unknown with intent (in the service of a district and people of the Island of Hayti, to wit, certain rebels who are in a state of insurrection against the organised and recognized Government of the Republic of Hayti) to cruise and carry on hostilities against the subjects, citizens and property of the Republic of Hayti with which the United States are at peace.

Second. That the said vessel on or about the 15th day of July, 1883, within the limits of the United States and of the Southern District of New York and within the jurisdiction of this court, was fitted out and armed by certain persons to said attorney unknown, with the intent that such vessel should be employed in the service of a certain people and district of the Island of Hayti (to wit, certain rebels who are in a state of insurrection against the organized and recognized government of the Republic of Hayti), to cruise and carry on hostilities against the subjects, citizens and property of the Republic of Hayti with which the United States are at peace.

Third. That on or about the 15th day of July, 1883, within the Southern District of New York and within the limits of the United States and within the jurisdiction of this court, certain persons to said attorney unknown, were knowingly concerned in the furnishing and fitting out of said vessel, with intent that said vessel should be employed in the service of a certain district and people foreign to the United States in the Island of Hayti, to wit, certain rebels

who are and then were in a state of insurrection against the organized and recognized government of the Island of Hayti, to cruise and carry on hostilities against the subjects, citizens and property of the Republic of Hayti, with which the United States are at peace.

Fourth. That the said vessel was, on or about the 15th day of July, 1883, within the limits of the United States, to wit, at the Southern District of New York aforesaid, furnished, fitted out or armed by certain persons to the said attorney unknown with the intent of which said unknown persons had knowledge; that said vessel should be employed in the service of a foreign people, to wit, a portion of the people of the Island of Hayti, to cruise or commit hostilities against the subjects, citizens or property of the Republic of Hayti, with which the United States are at peace.

Fifth. That all and singular the matters hereinbefore, firstly, secondly, thirdly, fourthly, articulated, are contrary to the Section 5283 of the Revised Statutes of the United States.

That by reason of the premises and by virtue of the said section the said vessel, the steamtug Mary N. Hogen, her tackle, etc., her arms, etc., became forfeited.

That all and singular the premises aforesaid, are and were true, and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore the said attorney of the United States on behalf of the United States prays the usual process and monition of this Honorable Court against the said vessel, the Mary N. Hogen and her tackle, apparel, furniture, arms, and ammunition in this behalf to be made, and that all persons interested in such vessel and her tackle, apparel, furniture, arms, and ammunition aforesaid, may be cited to answer the premises, and that all due proceedings being had thereon this Honorable Court may be pleased to decree for the forfeiture aforesaid, and that the said vessel, the Mary N. Hogen and her tackle, etc., and arms, stores, etc., may be condemned as forfeited, according to statute and the acts of Congress in that behalf provided.

(Signed) ELIHU ROOT,
U. S. Attorney.

Endorsed Libel.
Filed July 20, 1883.

District Court of the United States for the Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
THE STEAM-TUG "MARY N. HOGEN" HER TACKLE, &C.

Amended Libel of Information.

And upon the 6th day of August, A. D. 1883, comes Elihu Root, Attorney of the United States of America for the Southern District of New York, who prosecutes here for the said United States of America, in its behalf, a cause of forfeiture, civil and maritime, in which the said United States of America is concerned, and informs this Honorable Court:

That the United States of America brings suit herein against a certain vessel, the steam-tug "Mary N. Hogen," her tackle, apparel and furniture, for breach of the neutrality and navigation laws of the said United States of America, and alleges:

First. That the said vessel is now lying at the port of New York, in waters navigable from the sea by vessels of the burden of ten tons and upwards, within the Southern District of New York, and within the jurisdiction of this court, and is ready to sail for certain places, to the said attorney of the United States of America unknown, with the intent (in the service of a district and people of the Island of Hayti, to wit, certain rebels who are in a state of insurrection against the organized and recognized government of the Republic of Hayti) to cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, with which the United States of America is at peace.

Second. That the said vessel, on or about the 15th day of July, A. D. 1883, within the limits of the United States of America and the Southern District of New York, and within the jurisdiction of this court, was fitted out and armed by certain persons to said attorney of the United States of America unknown, with the intent that such vessel should be employed in the service of a certain people and district of the Island of Hayti (to wit, certain rebels who are in a state of insurrection against the organized and recognized government of the Republic of Hayti), to cruise or commit hostilities against the subjects, citizens, and property of the Republic of Hayti, with which the United States of America then was and now is at peace.

Third. That on or about the 15th day of July, A. D. 1883, within the Southern District of New York and within the limits of the United States of America, and within the jurisdiction of this court,

certain persons, to the said attorney of the said United States of America unknown, were knowingly concerned in the furnishing and fitting out of said vessel, with intent that the said vessel should be employed (in the service of a certain district and people, foreign to the United States of America, in the Island of Hayti, to wit, certain rebels who are and then were in a state of insurrection against the organized and recognized government of the Republic of Hayti), to cruise and commit hostilities against the subjects, citizens, and property of the Republic of Hayti, with which the United States of America then was and now is at peace.

Fourth. That the said vessel was, on or about the 15th day of July, A. D. 1883, within the limits of the United States of America, to wit, at the Southern District of New York aforesaid, furnished, fitted out, or armed, by certain persons, to the said attorney of the United States of America unknown, with the intent, of which the said unknown persons had knowledge, that said vessel should be employed in the service of a foreign people, to wit, a portion of the people of the Island of Hayti, to cruise or commit hostilities against the subjects, citizens or property of the Republic of Hayti, with which the United States of America then was and now is at peace.

Fifth. That on or about the 15th day of July, A. D. 1883, within the limits of the United States of America, at the Southern District of New York, certain persons, to the said attorney of the United States of America unknown, attempted to fit out and arm the said vessel, with intent that such vessel should be employed in the service of a foreign people, to wit, a portion of the people of the Island of Hayti, to cruise or commit hostilities against the subjects, citizens or property of the Republic of Hayti, with which the United States of America then was and now is at peace.

Sixth. That all and singular the matters hereinbefore, firstly, secondly, thirdly, fourthly, fifthly, articulated are contrary to Section 5283 of the Revised Statutes of the United States of America:

That by reason of the premises and by virtue of the said section, the said vessel, the steam-tug "Mary N. Hogen," her tackle, &c., her arms, &c., became forfeited.

Seventh. That at the times in this article specified, the said vessel, the steam-tug "Mary N. Hogen," was not entitled to the benefit of the Certificate of Registry in the article referred to, in that such vessel did not belong wholly to a citizen or citizens of the United States; that on or about the 25th day of June, 1883, a certificate of registry of said vessel was obtained from the collector of the port of New York and collection district of New York by one John H. McCarthy (who was master and in possession of said vessel and claimed to be the owner thereof), knowingly and fraudulently, by means of an oath in writing by said McCarthy taken and subscribed, in order to the registry of said vessel, before a deputy of said collector, in which oath, said McCarthy stated that

he was the sole owner of said vessel, whereas, to his knowledge, the fact was that he was not the sole owner thereof; and in which said McCarthy further stated that there was no subject or citizen of any foreign prince or state, directly, or indirectly, by way of trust, confidence, or otherwise, interested in said vessel, whereas, to his said McCarthy's knowledge, the fact was, that a subject or citizen of a foreign prince or state was interested by way of confidence, trust, or otherwise, in said vessel.

Whereby and by force of Section 4189 of the Revised Statutes of the United States of America, the said vessel, the steam-tug "Mary N. Hogen," with her tackle, apparel and furniture became liable to forfeiture.

Eighth. That all and singular the premises are and were true and within the admiralty and maritime jurisdiction of the United States of America and this Honorable Court.

Wherefore the said Attorney of the United States of America prays the usual process and monition of this Honorable Court against the said vessel, the "Mary N. Hogen," and her tackle, apparel, furniture, arms and ammunition, in this behalf to be made, and that all persons interested in such vessel and her tackle, apparel, furniture, arms and ammunition aforesaid, may be cited to answer the premises, and that all due proceedings being had thereon, this Honorable Court may be pleased to decree for the forfeiture aforesaid and that the said vessel, the "Mary N. Hogen," and her tackle, etc., and arms, stores, etc., may be condemned as forfeited according to the statutes and acts of Congress in that behalf provided.

(Signed) ELIHU ROOT,
U. S. Attorney.

Endorsed amended libel of information.
Filed August 6, 1883.

At a stated term of the District Court of the United States of America for the Southern District of New York, held at the United States court room in the City of New York on the twenty-eighth day of November, in the year 1883.

Present: The Honorable Addison Brown, District Judge.

THE UNITED STATES OF AMERICA
against
THE STEAMTUG "MARY N. HOGAN" HER TACKLE, APPAREL, FURNITURE, &C.

This cause having been heard on the pleadings and proofs, and argued and submitted on briefs and points by the advocates for the respective parties, and due deliberation being had in the prem-

ises, and notwithstanding the objection and protest of the parties, defenders and claimants by their counsel, in open court, that the defence possessed the right by law to send the said steamtug to Jamaica for the purpose of raising the wreck of the Calvert, and thereafter to sell and transfer her to any purchaser as an article of merchandise notwithstanding the provisions of the Act of Congress counted upon in the said Libel of Information, and the case aforesaid having been heard upon the pleadings and proofs and upon the arguments of the advocates for the respective parties, and after due consideration thereof.

It is ordered, adjudged, and decreed that the said steamtug "Mary N. Hogan" her tackle, apparel, and furniture be and the same hereby are condemned as forfeited to the United States, and it is further ordered, adjudged, and decreed that unless an appeal be taken from this decree within the time limited and prescribed by the rules and practice of this court, the clerk of this court issue a write of venditioni exponas directed to the marshal of the district for the sale of said steamtug "Mary N. Hogan" her tackle, apparel, and furniture with all the material and stores belonging thereto and the proceeds of such sale to be paid into court and distributed according to law unless in the meantime the same shall be admitted to bail by order of the court, and, that the costs of the plaintiff including stenographer's fees, amounting in all to two thousand four hundred and fifty dollars and sixteen cents as taxed, be paid out of such proceeds.

ADDISON BROWN.

Endorsed Final Decree.
Filed Nov'r 28, 1883.

UNITED STATES v. THE MARY N. HOGAN. 17 FEDERAL REPORTER, p. 813.

(*August 10, 1883. District Court of U. S., Southern District of New York.*)

In Admiralty.

BROWN, J. The steam-tug Mary N. Hogan being in the custody of the marshal, under arrest upon process issued for her forfeiture to the United States, application is made in behalf of John H. McCarthy, her alleged owner, for the appointment of appraisers to determine her value, preliminary to giving bond for her release from custody. The application is opposed by the district attorney on the ground that the claimant is not, in this case, entitled to bond the vessel. The proceedings for the forfeiture of the vessel are instituted under Sections 5283 and 4189 of the Revised Statutes. The

former section subjects to forfeiture any vessel "furnished, fitted out or armed within the limits of the United States with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace." The libel charges that the Mary N. Hogan, on or about the fifteenth of July, 1883, was furnished, fitted out, or armed within this district, with the intent that she should be employed in the service of certain rebels in the island of Hayti, to cruise or commit hostilities against the subjects, citizens, or property of the island of Hayti, with which the United States are at peace.

By section 4189, also, every vessel is made liable to forfeiture whose certificate of registry "is knowing and fraudulently obtained;" and the libel charges that John H. McCarthy, on or about the fifteenth day of July, 1883, knowingly and fraudulently procured the registry of said vessel in his name as sole owner, upon oath that there was no subject or citizen of any foreign prince or state directly or indirectly interested in her, whereas, in fact, a foreign citizen was part owner.

The proceedings for the forfeiture of the vessel are proceedings in admiralty, and governed by the admiralty rules. The appointment of appraisers and the bonding of the vessel are claimed under rule 11 of the Supreme Court rules in admiralty, which provides that "where any ship shall be arrested, the same *may*, upon the application of the claimant, be delivered to him upon due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving stipulation with sureties," etc.

In the great majority of cases suits are brought, and the arrest of the vessel is made, for the purpose only of securing payment of some pecuniary demand. In such cases the object of the suit will be fully secured by permitting a good bond, with sureties, to be substituted as security in place of the vessel during the pendency of the litigation; and thereby not only is the great expense of keeping the vessel in custody for a considerable period avoided, but the vessel is also allowed in the meantime to be engaged in the pursuits of commerce. Rule 11 is clearly designed for this purpose. It is not in form imperative in all cases of the arrest of vessels, but provides only that the vessel "*may*" be delivered, etc.; thus leaving to the court a discretion which may be rightly exercised under peculiar circumstances; and, as it seems to me, the rule clearly should not be applied in those cases where the object of the suit is not the enforcement of any money demand, nor to secure any payment of damages, but to take possession of and forfeit the vessel herself, in order to prevent her departure upon an unlawful expedition, in

violation of the neutrality laws of the United States. Such, by the statements of the libel, appears to be the sole object of this suit; and to permit the vessel, as soon as arrested, to be bonded by the very persons alleged to be engaged in this unlawful expedition, and bonded presumably for the purpose of immediately prosecuting it, would be to facilitate in the most direct manner the unlawful expedition, and would practically defeat the whole object of the suit, and render the government powerless by legal proceedings to prevent the violation of its international obligations.

No section of the statutes other than section 5283 fully meets the circumstances of this case. That section is rightly invoked to enable the government to preserve itself from large possible liabilities through a violation of its treaty obligations to Hayti. It is clearly not the intention of section 5283, in imposing a forfeiture, to accept the value of the vessel as the price of a hostile expedition against a friendly power, which might entail a hundred-fold greater liabilities on the part of the government. No unnecessary interpretation of the rules should be adopted which would permit that result; and yet such might be the result, and even the expected result, of a release of the vessel on bond. The plain intent of section 5283 is effectually to prevent any such expedition altogether, through the seizure and forfeiture of the vessel herself. The government is, therefore, entitled to retain her in custody, and rule 11 cannot be properly applied to such a case.

Upon the papers submitted it appears that the proceedings are promoted at the instance of responsible officers of the Haytian government; and there is no evidence before me tending to show that the proceedings are in bad faith, or malicious, or on insufficient *prima facie* grounds; and the application for appraisers for the purpose of bonding should, therefore, be denied.

As the vessel is in custody, either party, under the rules of the court, is entitled to an immediate trial. No term for the trial of calendar causes being in session at this time, upon the consent of the United States attorney, already given in open court, the claimant upon filing his answer to the libel, may have an immediate order of reference to the clerk to take the testimony in the cause; and when completed the case may be submitted, and will be at once disposed of.

UNITED STATES VS. THE MARY N. HOGAN. 18 FEDERAL REPORTER, 529.

(*November 23, 1883. District Court of the U. S., Southern District of New York.*)

Information for Violation of Neutrality Laws.

ELIHU ROOT, Dist. Atty., for the United States.

GEORGE H. FORSTER, for claimant.

Brown, J. On the twentieth day of July, 1883, the steam-tug Mary N. Hogan was seized at this port by order of the collector. The information in this case was thereupon filed to procure her condemnation, upon two grounds: *First*, for violation of section 5283 of the Revised Statutes, in being fitted out with the intent that she should be employed to commit hostilities against the recognized government of Hayti; and, *second*, for a violation of section 4189, 4142, in being knowingly and fraudulently registered in the name of John H. McCarthy, under a false oath that no subject or citizen of any foreign prince or state was directly or indirectly interested in the vessel. The Mary N. Hogan was a steam-tug of about 37 tons register, 90 feet long, 20 feet beam, and 9 feet depth of hold, built for ordinary towing service about the harbor of New York, and in no respect distinguishable by any peculiarities from the numerous other tugs of her class in this port. Her draught, loaded, was about 9 feet, and her full speed, when in good order, 10 to 11 knots. When seized on the twentieth of July she was nearly ready for sea, it having been given out that she was to proceed to Port Antonio, Jamaica, for the purpose of assisting in raising the steamer Calvert, which had been sunk in that harbor by a collision. At the time of seizure she had all her coal on board for the voyage. She had previously received some repairs, none of a very important character, the chief of which were replacing a somewhat decayed beam by a new one, and the addition of a keel condenser for the purpose of obtaining fresh water on the voyage. Several examinations by experts on behalf of the government previous to the seizure failed to discover any repairs or preparations indicating any intended service in military or naval operations. No arms, ammunition or other warlike appliances were on board. From the evidence it clearly appears that though the Hogan was wholly unadapted to effective naval operations against any considerable organized opposition, she could be of the greatest service to the insurgents by her light draught and considerable speed in landing or taking off men at unprotected points on the coast of Hayti by watching her opportunities of running in and out, as well as in offensive demonstrations against defenseless parts of the island, with little to fear from the slight naval resources of the lawful government. U. S. v. Rand, 17 Fed. Rep. 142.

The facts upon which the prosecution relies are mainly as follows:

Since March, 1883, an insurrection has been in progress in Hayti by armed insurgents at war with the pre-existing government, which had been and still is alone recognized in this country as the lawful government of that island. The insurrection originated at the port of Miragoane, through an expedition which started from Philadelphia on March 15, 1883, upon the steamer Tropic, with arms and ammunition, nominally bound for Kingston, Jamaica. The Tropic did not go to Kingston, but went to the island of Inagua, about 30 miles from Hayti, where she took on board Gen. Boyer Bazelais, the recognized leader of the rebellion, with 75 or 100 armed men, and about the same number afterwards from an English steamer at sea, and then proceeded to the port of Miragoane, where Gen. Bazelais, with all the men, arms, and ammunition were landed about daybreak, and the insurrection successfully inaugurated. Bazelais, before leaving Jamaica, had supplied one Simon Soutar, a merchant of Kingston, who was interested in the Haytian insurrection, with money for the purpose of purchasing arms and ammunition. The arms and ammunition which went out upon the Tropic were purchased in New York by Henry A. Kearney, upon Soutar's order, from Joseph W. Fraser, of this city, and were shipped by the latter to Philadelphia, and there shipped on board the Tropic by Kearney. See U. S. v. Rand, *supra*.

In June, 1883, Mr. Soutar came to this city. Acting in his behalf, Kearney entered upon negotiations for the purchase of a tug-boat, and on the twenty-third of June made a contract with one Moran for the purchase of the Hogan, at the price of $11,600. Prior to this time Soutar had been made acquainted with John H. McCarthy, a roving and adventurous navigator, experienced in blockade running, and made three times a prisoner during the war of the rebellion, who had served at Sebastopol and in the Mediterranean, and was familiar with the waters of the West Indies. Upon the purchase of the Hogan all the money was supplied by Soutar to Kearney, who paid it to Moran, while the contract of purchase and the bill of sale of the vessel were taken in the name of McCarthy. On Monday, the twenty-fifth of June, the register of the vessel was made in the custom-house in the name of McCarthy, upon a bill of sale delivered to him at that time, and McCarthy at the same time executed a bill of sale from himself to Philip William Abbott, a resident of Kingston, Jamaica, also interested in the Haytian insurrection, and described by McCarthy as the partner of Soutar. At the time of the registry of the vessel in the name of McCarthy, he made oath that "no citizen or subject of any foreign state or prince was interested in the vessel directly or indirectly." The bill of sale to Abbott was never registered. McCarthy testifies that he supposed it to be a mortgage; that he understood previously

that he was to take the title of the Hogan and execute a mortgage back for the full price; that he did not expect to pay for the vessel in any other way than by the mortgage. McCarthy states that he was engaged to act as captain of the tug, to assist in raising the Calvert at Port Antonio, and to do towing around the island, for which he was to receive $125 per month. After the purchase of the Hogan, McCarthy went into possession as captain, took her to Astoria, where the repairs above mentioned were made, and afterwards obtained a supply of coal at Hoboken, whence he returned to pier 28, East River, to take in additional stores preparatory to departure upon his voyage. McCarthy procured seamen and engineers for the voyage; but all the bills, with unimportant exceptions, were paid by Kearney, with money supplied by Soutar, and Kearney had the general direction and supervision of the Hogan in this port.

While these preparations on the Hogan were in progress, Soutar purchased from Fraser various arms and ammunition, to the value of $7,000, including rifles, a twenty-pound army Parrot gun, a three-inch Parrot gun, and two field carriages. They were in part shipped by Fraser at pier 28, East river, on board the schooner E. G. Erwin, which cleared for Richmond and sailed on July 18th, two days before the seizure of the Hogan. The rest of the arms, being left behind through the Erwin's sailing earlier than Fraser had expected, were forwarded by rail and taken on board the Erwin at Lewes, Delaware. The shipment of the arms on board the schooner Erwin was arranged by one George W. Brown, a ship-broker, at the request of Kearney, who knew Brown to have been previously successful in arranging for the shipment of warlike material to the Cuban insurgents. Brown prepared private signals and instructions for the captain of the Erwin, to the effect that the arms and ammunition in question should be transferred in the vicinity of Hog Island, Hampton Roads, to a steamer which would meet him there and give the signals agreed on, and that the arms and ammunition should be delivered on presentation of the schooner's receipts and payment of his charges. A copy of these instructions and signals was given to Kearney. The Hogan was seized on the 20th. No vessel met the schooner near Hog Island or Hampton Roads, as was designed and the Erwin, after cruising several days in that vicinity, and finding no vessel to answer the concerted signals, went on her way to Richmond, for which place she had other goods. Shortly afterwards the arms and ammunitions purchased by Soutar were seized by the federal authorities at Richmond; but before this was known to Kearney he had told Brown that no vessel had met the Erwin in Hampton Roads; that she had taken the arms to Richmond; and that he desired Brown to arrange for their transport to the West Indies. Brown thereupon made partial arrangements, at Kearney's request, to take the arms and ammunitions to the Island

of Navassa, a small guano island, without harbor or ordinary habitations, between Jamacia and Hayti, and about 40 miles from the latter. Intelligence of the seizure of the arms at Richmond put an end to further negotiations on that subject.

Four witnesses gave direct testimony of the statements of McCarthy as to the destination of the Hogan. McCormick, a constable of Brooklyn, testified that McCarthy told him that he expected to clear the next Wednesday for Hayti, and that he expected to take two guns aboard on the way. Mary Costigan testified that McCarthy engaged her husband for first engineer, and also to serve as a gunner, in which capacity he had previously served, and that he said he was going to Miragoane, Hayti. Her husband and one Cox testified that McCarthy said they were going to fight Hayti, and would take in arms on the way.

The claimant gave no evidence touching the destination of the arms and ammunition purchased of Fraser; and, as regards the destination of the Hogan, he relied solely upon the statement made to various persons in the course of the negotiations for the purchase of the Hogan, and on the testimony of Capt. McCarthy that she was designed to go to Port Antonio for the purpose of raising the wreck of the Calvert. Neither the claimant Abbott nor Soutar appeared as witnesses, nor was their testimony taken by commission.

A letter from Soutar to Kearney, dated July 3, 1883, was introduced in evidence, the material parts of which are as follows:

"Soutar & Co.
"Address for Telegrams,
"Soutar, Jamaica.

"KINGSTON, 3d July, 1883.
"Jamaica.

"H. A. KEARNEY, Esq., 1400 *Sixth Avenue, New York.*

"DEAR SIR: The writer duly arrived on Friday, and we are now anxiously waiting advices from you, as we expected everything would have been ready and dispatched ere this. We telegraphed you yesterday, 'Salaried standard, Calvert's matter,' but up to present, 1 P. M., have no reply. We should like the Calvert's matter put in hand as early as possible. If you have already procured two schrs., long 3-masters, of from 300 to 350 tons register, then get made at Perry & Jones', Wilmington, Del., or at any of the machine shops, 4 4-inch screws about 12 feet long, with a square thread of 3-8 of an inch, and 5-8 deep, with a lever of 8 feet long. * * * See that everything is completed and despatched as soon as possible. * * * Captain Edwards, whom the writer saw at B. I. Werberg's asked $1,000 a month for 320-ton schooners, but would take less. * * * We think the plan of raising her with screws the best, and would like to get under way as soon as possible. If you can get letters out to us by Warner & Merritt's steamers, write us by that way as well as by mail, and perhaps Mr. Merritt may be able

to help you in getting the schooner or screws, or in some other way in the Calvert's matter. She has been lying under water too long already, and we are very anxious to get to work as early as possible. * * *"

The claimant also proved the purchase by Soutar of the wreck of the Calvert for $500; that in July Kearney was negotiating in New York for the purchase or lease of two three-masted schooners, to be used in raising the Calvert, which, however, were not obtained here; that four beams and jack-screws, with chains, were in August shipped to Port Antonio, for the purpose of raising the Calvert; that the Erwin carried some arms and ammunition on the voyage above referred to, consigned, by way of Richmond, to *bona fide* purchasers in the interior; and that great alterations and strengthening would be necessary in the Hogan to make her fit for any considerable permanent naval operations, or for any successful contest with armed antagonists.

No testimony was offered by the claimant to show what vessel was expected to receive the arms and ammunition from the Erwin in Hampton Roads; nor was any explanation offered of the title of the vessel being first taken in the name of McCarthy and then by a secret bill of sale transferred to Abbott.

The only rational inference that can be drawn from the above facts is that the Hogan was designed to be used for the conveyance of arms and ammunition in aid of the insurrectionists in Hayti, and for other aid, and such hostile demonstrations as she was fit to make against the defenseless parts of the coast. The circumstantial evidence, together with the direct evidence of four witnesses, strongly sustains this conclusion; while the ostentible purpose of the Hogan's voyage has little that is natural, plausible, or probable to sustain it; and other circumstances, easy for the claimants to have explained if the Hogan was destined upon a legitimate business, and left wholly unexplained. Expeditions of this character are highly penal. Vessels cannot be fitted out or be cleared without more or less publicity. It is to be expected, therefore, in every case of such unlawful expeditions, that some pretext will be given out which must have connected with it some circumstances of reality to be of any value; and the question is necessarily presented whether the ostensible purpose of the voyage, more or less plausible, is the *bona fide* and sole object, or only a cover for departure upon a hostile expedition, as in the case of the Tropic.

All the circumstances in this case seem to me to show that the ostensible purpose for which the Hogan was going was a pretext, and not the real object of her voyage. While some direct evidence may not be wanting, yet for the most part cases of this sort must depend upon circumstantial evidence. In the *Slaver Cases*, 2 Wall. 401, the court say: "Ships of this description necessarily give rise

to a wide range of investigation, for the reason that the purpose of the voyage is directly involved in the issue. Experience shows that positive proof in such cases is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the matters of ascertaining the truth. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." So, in Judge BETTS' charge to the grand jury, as quoted in Wharton's Criminal Law, in relation to the neutrality act, he says:

"It must be manifest to you, gentlemen, that these criminal designs, if entertained, will be managed with much disguise and caution; it is not probable that soldiers will be openly enlisted, or officers commissioned, or vessels freighted to transport munitions of war or men to the field of action. Pretenses and coloring will be employed to mask the real object the parties to such criminal projects contemplate. But if you discover the purpose really to be to supply the means of hostile aggression against Cuba, then all persons connected with it, and promoting it, will be answerable for the violation of the laws of the United States in the undertaking, the same as if their proceedings had been openly and avowedly intended for a hostile invasion, and waging war on that community."

In the present case there are four lines or groups of evidence which all concur in the conclusion I have stated: (1) The circumstances connected with the simultaneous purchase by Soutar of a large quantity of arms and ammunition and of the Hogan, and their intended dispatch about the same time with the intended transhipment near Hog island; (2) the absence of explanations within the power of the claimant, if the expedition were legitimate and lawful; (3) the direct evidence inculpating the Hogan; and (4) the improbabilities that the purchase of the Hogan was simply to raise the wreck of the Calvert, as suggested.

1. Soutar was the agent of Bazelais, the leader of the insurrection in Hayti, and had enabled the latter successfully to inaugurate the revolt through an expedition which Soutar had organized in this country, with arms and ammunition purchased in New York and shipped to Philadelphia on the Tropic, under a false clearance for Kingston, in March, 1883. In June, three months afterwards, we find Soutar himself in this country again purchasing $7,000 worth of arms and ammunition, which subsequent events clearly prove were destined for the support of the insurrection in Hayti, and simultaneous therewith negotiating, through Kearney, for the purchase of a steam-tug, ostensibly to go to Port Antonio, Jamaica. These arms and ammunitions were shipped on board the schooner Erwin at pier 28, which cleared on the eighteenth of July, under secret instructions to transfer them at Hog island, near Hampton Roads, to a steamer which was to appear for them there, and receive

them on concerted signals. These instructions and signals were arranged at Kearney's request and communicated to him, and he also had the general superintendence of the fitting out of the Hogan for sea. Two days afterwards we find the Hogan at pier 28, on the eve of her departure, with all her coal on board, ostensibly bound for Jamaica, like the tropic, and with only some few stores or provisions remaining to be taken aboard, and prepared to sail in time to reach the rendezvous near Hog island. The Hogan is seized on the 20th, and no steamer or other vessel meets the Erwin near Hog island, as carefully planned, though the Erwin cruises up and down for nearly a week, and the arms, contrary to design, are carried on to Richmond. The seizure of the Hogan has apparently disconcerted the carefully devised plans of Soutar and Kearney in the purchase of a large quantity of arms, and the simultaneous purchase and fitting out of the tug. These are at least circumstances of an extremely suspicious character, and if unexplained, when explanation is in the power of the claimant, they necessitate the inference that the Hogan was the vessel designed to receive the arms near Hog island for use against Hayti. *Slaver Cases*, 2 Wall. 350, 401; *Clifton* v. *U. S.*, 4 How. 242.

2. No explanations, however, are offered, either as to the purchase of this large quantity of arms and ammunition, or of the failure of any vessel to meet the Erwin at Hampton Roads. If these arms and ammunition, to the amount of $7,000 in value, had been destined for any other use than in aid of the Haytian insurrection, it would have been easy for the claimant to show it; and so as regards the vessel which was to meet the Erwin. The whole arrangement had been made at Kearney's request, and he received a copy of the instructions and signals as agent of Soutar, and could easily have shown that the Hogan was not the vessel intended to receive these arms, if such were the fact. If it were a vessel from a foreign port that was to meet the Erwin, that fact could have been shown without evidence of any violation of our law; while it is improbable in the last degree that Soutar and Kearney were at this very moment engaged in fitting out and sending from this country some other vessel than the Hogan, which does not appear in the case, to meet the Erwin at Hampton Roads. They were fitting out the Hogan; they had purchased her at the price of $11,600, and she was about to sail at the appropriate moment to meet the Erwin, according to instructions and concerted signals clearly proved; and the inference is irresistible, in the absence of all explanation, and of proof of any other vessel designed for that purpose, that the Hogan was the vessel designed for that rendezvous, and to proceed thence to assist the Haytian insurgents. These arms and ammunition weighed but 20 tons, scarcely more than the coal she would consume on her way to Hampton Roads, and they were easily within her power to take.

3. Four witnesses testified to the direct statements of Capt. McCarthy showing that the Hogan was being fitted out to aid the insurrection; that Cox and Costigan were wanted by Capt. McCarthy because they had had experience in the navy as gunners, although he refused to tell them the name of the vessel on which he desired to ship them, it being before the Hogan was actually purchased, but while negotiations were pending for the purpose of getting some steamer; and that he told them that the vessel was going to Miragoane; that there would be fighting there; and that arms were to be transferred to him on the way. Capt. McCarthy denies this statement; and it is urged that it is extremely improbable that he would make any such disclosures, even if true. But this argument is weakened by the fact which appeared in evidence, and which to some extent fell under the observation of the court, that Capt. McCarthy, besides apparently being usually voluble in conversation, became much more so when under the influence of liquor, to which he was occasionally addicted, so as not to be restrained by the ordinary considerations of prudence and caution. Some of the statements made by him, given in evidence, were made when under the influence of liquor; and for that reason the weight to be attached to them would be undoubtedly diminished; and though the general character of the four witnesses referred to is not of the highest credibility, still all this evidence falls in completely with the other circumstances of the case; and, as there is no impeachment of these witnesses, their testimony cannot be disregarded, but must be held as at least somewhat strengthening the conclusion to which all the circumstances point.

4. The improbabilities of the ostensible purpose of the Hogan, namely, to raise the wreck of the Calvert at Port Antonio, Jamaica, I do not question, upon the evidence, that Soutar had purchased this wreck for $500, and was proposing to raise it. The Hogan alone, would, however, be of no service in raising such a wreck. She was wholly unadapted for such a service, and incapable of doing it. The plan actually proposed for raising this wreck, as the evidence showed, was to procure two long three-masted schooners, to be placed one on each side of the wreck, with four beams running across, each furnished with a jack-screw and chains, by means of which the wreck should be raised. The Hogan might be made useful to some extent in merely towing the schooners into place, in towing away the wreck when raised, and serve as a convenient tender in the progress of the work; but there was no evidence that aid of a character so entirely subordinate could not be procured at Port Antonio from some other tugs at a comparatively trifling expense; and it would seem in the highest degree improbable that, for services so comparatively slight and subsidiary, Soutar should have expended $11,600 in the purchase of the tug Hogan. The Hogan, moreover, was equipped for sea long before

the other preparations for raising the wreck were made. Some negotiations for the hiring of schooners were entered into by Kearney here, but they failed, either the schooners or the price being unsatisfactory. By Soutar's letter to Kearney from Kingston, July 3rd, it appears that he arrived there from New York on the twenty-ninth of June from which it may be inferred that he left New York immediately after the purchase of the Hogan, and of the arms and ammunition above referred to. In this letter he desires that "Calvert's matter be put in hand as early as possible," and gives directions to have screws and beams made for use in that business if schooners are obtained. These beams or screws were not procured or shipped until August, nearly a month after the Hogan was ready to sail. It is manifest, therefore, that this voyage of the Hogan was long before there were any preparations for raising the Calvert, and could not have been intended for that purpose.

Again, had this been the real object of the Hogan, it is improbable that the case would have been left with such very loose and inadequate evidence of it. As it stands, the evidence consists only of McCarthy's statements of what Soutar told him, and of other casual statements in the course of the negotiations for the purchase of the Hogan. It is quite possible, and even probable, that it may have been designed to use the Hogan to assist in raising the Calvert when the other preparations were ready; so that the vague evidence of the kind referred to, though not false, is in no way incompatible with the primary and direct object of the voyage being to aid in the insurrection. If, moreover, the object of this voyage was a legitimate commercial venture, no reason appears why Soutar, having paid $11,000 for the Hogan, should have the title taken and registered in the name of Capt. McCarthy, and afterwards, by a secret bill of sale, transferred to his partner, Abbott. Nor are the character and antecedents of Capt. McCarthy such as would render it probable that he would be employed as the captain of a tug-boat to be used as a mere tender in raising the Calvert or in towing about the island; nor does the business of towing appear to form any part of Soutar's ordinary business.

The evident disguise and concealment under which the Hogan was purchased and her title taken and kept, the failure to exhibit by any direct or satisfactory proof any legitimate business at the time she was fitting out; the absence of all evidence from the parties immediately and most deeply interested, when their testimony might easily have been procured had her destination been a legitimate one; together with the strong circumstantial evidence above stated, sustained by the direct evidence of witnesses as good as could be expected to be employed in such an expedition, leave no doubt in my mind that the Hogan was fitted out for the purpose of receiving, near Hampton Roads, the $7,000 worth of arms and ammunition

which had been dispatched by the Erwin to that rendezvous two days before, and of proceeding thence to Hayti, in aid of the insurgents there in the various ways for which she was suited.

The evidence shows, therefore, a hostile expedition organized and dispatched from our ports in separate parts, to be united at a common rendezvous on the high seas, and to proceed thence to Hayti, in completion of the original hostile purpose with which the different parts were dispatched from our shores. Such an expedition is as much within the prohibition of section 5283 of the Revised Statutes as if all its parts were united and complete upon one single vessel at the moment of its departure. *U. S.* v. *Quincy*, 6 Pet. 445; *U. S.* v. *Gooding*, 12 Wheat. 472; *The Meteor*, (per BETTS, J.) 245–250.

A decree for the condemnation of the Mary N. Hogan must therefore be awarded.

UNITED STATES VS. 140 KEGS OF POWDER, &C.

In the District Court of the United States for the Eastern District of Virginia.

To the Honorable Robert W. Hughes, judge of the said court:

The libel and information of Edmund Waddill, jr., Attorney of the said United States for the Eastern District of Virginia, who prosecutes in this behalf for the said United States, and being present here in court in his own proper person, in the name of and in behalf of the said United States, against One Hundred and Forty Kegs, Cans, Canisters, or Boxes of Powder and against all other persons intervening for their interest therein in a certain cause of *sie*zure and for*fie*ture, alleges and informs as follows:

First. That the said property, to wit, one hundred and forty kegs, cans, canisters, or boxes of powder, is now lying at the port of Richmond, Virginia, on a certain schooner called the "E. G. Irwin," in the waters navigable from the sea by vessels of the burthen of ten tons and upwards, or the said powder is secreted at the port of Richmond, Virginia, in some place to the said Attorney of the United States unknown, the same having been removed from the said schooner and thus secreted to prevent the *sie*zure thereof, within the limits of the United States, to wit, within the Eastern District of Virginia, and within the jurisdiction of this court, and is ready to be taken by the said schooner, or in some other way, to certain places to the said Attorney of the United States unknown, with the intent (in the service of a district or people of the Island of Hayti, to wit, certain rebels who are in a state of insurrection against the organized and recognized government of the Republic of Hayti); that said powder should be used in fitting out and arming the said schooner or some other vessel to cruise or commit hostilities against the subjects, citizens and property of the Republic of

Hayti, with which the United States of America are at peace and contrary to the form of the Statutes of the United States in such case made and provided.

That the said property, to wit, one hundred forty kegs, cans, canisters or boxes of powder, is now lying at the Port of Richmond, Virginia, on a certain schooner, called the "E. G. Irwin," in the waters navigable from the sea by vessels of the burthen of ten tons and upwards, or the said powder is secreted at the Port of Richmond, Virginia, in some place to the said attorney of the United States unknown, the same having been removed from the said schooner and thus secreted, to prevent the *sie*zure thereof, within the limits of the United States, to wit, in the Eastern District of Virginia and within the jurisdiction of this court, the said powder being on and having been on, the said schooner, the "E. G. Irwin," the said schooner being then and there, one S. H. Dodd, as master, engaged in violating the neutrality laws of the United States by fitting out and arming, or being knowingly engaged and concerned in the fitting out and arming, the said schooner, or some other vessel with the intent (in the service of a district or people of the Island of Hayti, to wit, certain rebels who are in a state of insurrection against the organized and recognized Government of the Republic of Hayti), that the said schooner or vessel should cruise or commit hostilities against the subjects, citizens and property of the Republic of Hayti, and the said powder, as aforementioned being then and there on the said vessel for the purpose of being used in fitting out and arming the said vessel or some other vessel, as a cruiser to cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, with which the United States of America are at peace, and contrary to the form of the statutes of the United States in such case made and provided.

Third. That the said property, to wit, one hundred and forty kegs, cans, canisters or boxes of powder, is now lying at the port of Richmond, Virginia, on a certain schooner called the "E. G. Irwin," in the waters navigable from the sea by vessels of the burthen of ten tons and upwards, or the said powder is secreted at the said port of Richmond, Virginia, in some place to the attorney of the United States unknown, the same having been removed from the said vessel, and thus secreted to prevent the *sie*zure thereof, within the limits of the United States, to wit, within the Eastern District of Virginia and within the jurisdiction of this court, said powder being then and thereon, or having then and there been on the said schooner, and the said schooner being then and there, one S. H. Dodd as master, engaged in violating the neutrality laws of the United States, by fitting out and arming, or by being knowingly engaged and concerned in the fitting out and arming of the said schooner, or some other schooner or vessel, with the intent (in the service of a district or people of the island of Hayti, to wit, certain

rebels who are in a state of insurrection against the organized and recognized government of the Republic Hayti), that said schooner or other vessel should cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, and the said powder being then and there on the said vessel for the purpose of increasing and augmenting the force of some cruiser, ship of war, or other armed vessel by adding to and changing the quantity, kind and quality, of the ammunition on such cruiser, said cruiser being then and there used to cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, the United States being at peace with said country, and contrary to the form of the statutes of the United States in such cases made and provided.

Fourth. That the said property, to wit, one hundred and forty kegs, cans, cannisters or boxes of powder is now lying at the port of Richmond, Virginia, on a certain schooner called the "E. G. Irwin," in the waters navigable from the sea, by vessels of the burthen of ten tons and upwards, or that the said powder is secreted at the said port of Richmond, Virginia, in some place to the said attorney of the United States unknown, the same having been removed from the said schooner and thus secreted to prevent the *sie*zure thereof, within the limits of the United States, to wit, within the Eastern District of Virginia, and within the jurisdiction of this court, the said powder being then and there secreted on the said vessel the "E. G. Irwin," one S. H. Dodd as master, either by the said Dodd as master, or by some person or persons, to the said attorney of the United States unknown, for the purpose of being then and there shipped and carried to some other point or points, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court, with the intent that the same should be then and there used in fitting out, furnishing, and arming the said vessel, or some other vessel, said vessel, or such vessel to be employed in the service of some other country, or people, with the intent (in the service of a district or people of the Island of Hayti, to wit, certain rebels who are in a state of insurrection against the organized and recognized government of the Republic of Hayti) to cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, with which the United States of America are at peace, and contrary to the form of the statutes of the United States in such case made and provided.

Fifth. That by reason of the premises, ans by force of the statutes in such case made and provided, the said powder aforementioned and described has become forfeited.

Sixth. That all and singular the premises one and all are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the said attorney prays that the usual process of attachment against the said property, to wit, one hundred and forty kegs, cans, canisters or boxes of powder, and the monition of this Honorable Court in this behalf to be made, and that all persons interested in the said property aforementioned and described may be cited to answer the premises, and, all these proceedings being had, that the said powder may for the causes aforesaid, and others appearing, be condemned by the definitive sentence and decree of this Honorable Court, as forfeited to the said United States, according to the form of the statutes in such case made and provided.

EDMUND WADDILL, JR.,
U. S. Attorney.

In the District Court of the United States for the Eastern District of Virginia.

THE UNITED STATES
vs.
140 KEGS OF POWDER, &C.
} Upon a Libel of Information.

This cause having been heard on the pleadings and proofs, and argued orally and also submitted on briefs by the advocates for the respective parties, and due deliberation being had in the premises, and after due consideration thereof,

It is ordered, adjudged, and decreed that 100 of the said kegs of powder (the district attorney releasing any claim as to the remaining 40 kegs) be and the same are hereby condemned as forfeited to the United States.

And it is further ordered, adjudged, and decreed that unless an appeal be taken from this decree within the time limited and proscribed by law and the rules and practice of this court, the clerk of this court shall issue a writ of venditioni exponas directed to the marshal of this district for the sale of the said 100 kegs of powder, and the proceeds of such sale to be distributed according to law, and that the costs of the plaintiffs be taxed and paid, subject to the approval of this court, out of the proceeds of the sale.

Richmond,
4th February, 1884.

RO. W. HUGHES,
Judge.

UNITED STATES VS. 214 BOXES MUNITIONS OF WAR, &C.

In the District Court of the United States for the Eastern District of Virginia.

To the Honorable Robert W. Hughes, judge of the District Court of the United States for the Eastern District of Virginia:

The libel and information of Edmund Waddill, Jr., attorney of the said United States, for the Eastern District of Virginia, who prosecutes in this behalf for the said United States, and being present and here in court, in his own proper person, in the name of and behalf of the said United States against Two Hundred and Fourteen Boxes of Munitions of War consisting of shot and shells, cartridges, rifles, friction primers and necessary flannel bags, and against two cannon and fixtures, and against all other persons intervening for their interest therein, in a certain cause of seizure and forfeiture, alleges and informs as follows:

First. That the said property, to-wit: two hundred and fourteen boxes of munitions of war consisting of shot and shells, cartridges, rifles, friction primers and necessary flannel bags, and two cannon and complete fixtures was on or about the —— day of —— 1883, found in and upon a certain schooner known as the "E. G. Irwin," said schooner being then and there engaged in violating the neutrality laws of the United States, and the said property and munitions of war being then and there on the said schooner for the purpose of violation of the neutrality laws of the United States by fitting out, or increasing, or augmenting some vessel, ship of war, cruiser or other armed vessel which belonged to some other, or was in the service of some other, foreign prince or state or of some colony, district or people, or to the subjects or citizens thereof, the same being at war with some other country, prince, state or colony, district or people, the United States being then and there at peace with such country, prince, state, colony, district or people, against the statutes of the United States in such case made and provided.

Second. That the said property aforementioned, to wit: 214 boxes of munitions of war consisting of shot and shells, cartridges, rifles, friction primers, and necessary flannel bags, and two cannon and complete fixtures were heretofore, to wit, on or about the 18th day of July, 1883, at the port of the city of New York and at the town of Lewis in the State of Delaware and within the jurisdiction of the United States secreted by some person or persons, to the said attorney unknown, in and upon a certain schooner called the "E. G. Irwin," S. H. Dodd, master, for the purpose of being then and there shipped to some other point, or points, within the admiralty and maritime jurisdiction of the United States, and to be then and there used in furnishing and fitting out, or arming some vessel, with the intent that such vessel should be employed in the service of some

foreign prince, or state, or of some colony, district or people, for the purpose of cruising or committing hostilities against the subjects, citizens or property of some other prince, state, colony, district or people with whom the United States are at peace. But the said property was not so used because before it could be shipped from the said schooner to the other vessel or steamer upon which it was to be run off the same was detected by the customs officers of the United States for the Eastern District of Virginia and the said schooner, along with the property aforementioned, is in the custody of the officers of the law, which said conduct, in using or attempting to use the said property as aforementioned is contrary to the statutes of the United States in such case made and provided.

Third. That by reason of the premises, and by force of the statute in such case made and provided, the said property aforementioned and described have become forfeited.

Fourth. That all and singular the premises are and were true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the said attorney prays the usual process of attachment against the said property and the monition of this Honorable Court, in this behalf to be made, and that all persons interesting in the said property aforementioned and described may be cited to answer the premises, and all due proceedings being had that the said property, to wit, 214 boxes of munitions of war, consisting of shot and shells, cartridges, rifles, friction primers, together with necessary flannel bags, and two cannon with complete fixtures, may, for the causes aforesaid, and others appearing, be condemned by the definative sentence and decree of this honorable court as forfeited to the said United States according to the form of the statutes in such case made and provided.

EDMUND WADDILL, JR.
U. S. Attorney.

In the District Court of the United States for the Eastern District of Virginia.

To the Honorable Robert W. Hughes, judge of the said court:

The amended Libel of Information of Edmund Waddill, Jr., Attorney of the United States for the Eastern District of Virginia, who prosecutes for the United States in this behalf, and being present here in court in his own proper person in the name of and on behalf of the said United States against Two Hundred and Fourteen Boxes munitions of war consisting of shot and shells, cartridges, rifles, friction primers and necessary flannel bags, and against two cannon and complete fixtures (an inventory of which said articles is herewith filed as a part of this libel), and against

all other persons intervening for their interest therein, in a certain cause of seizure and forfeiture, alleges and informs as follows, viz:

First. That the said property, to wit, 214 boxes munitions of war, consisting as aforesaid of shot and shells, cartridges, rifles, friction primers, and necessary flannel bags, and against two cannon and complete fixtures, and inventory whereof is filed as aforesaid, is now lying at the port of Richmond, Va., on a certain schooner called the "E. G. Irwin," in the waters navigable from the sea by vessels of the burthen of ten tons and upwards, or was so on the said vessel at the time of the seizure thereof, and of the said goods in this proceeding, within the limits of the United States, to wit, the Eastern District of Virginia and within the jurisdiction of this court, and was ready when seized to be taken by the said vessel to certain places to the said Attorney of the United States unknown, with the intent (in the service of a district or people of the Island of Hayti, to wit, certain rebels who are in a state of insurrection against the organized and recognized government of the Republic of Hayti), that said munitions of war should be used in fitting out and arming the said schooner, or some other vessel, to cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, with which the United States of America are at peace contrary to form of the statutes of the United States in such case made and provided.

Second. That the said property, to wit, 214 boxes munitions of war consisting of shot and shells, cartridges, rifles, friction primers and necessary flannel bags, and against two cannon and complete fixtures, and inventory whereof is filed as aforesaid, is now lying at the port of Richmond, Virginia, on a certain schooner called the "E. G. Irwin," in the waters navigable from the sea by vessels of the burthen of ten tons and upwards, or were so on the said vessel at the time of the seizure and the said goods in these proceeds, within the limits of the United States, to wit, in the Eastern District of Virginia and within the jurisdiction of this court, the said property, munitions of war as aforesaid, being found on the said schooner the E. G. Irwin, the said schooner being then and there, one S. H. Dodd, as master, engaged in violating the neutrality laws of the United States by fitting out and arming, or being knowingly engaged and concerned in the fitting out and arming the said schooner or some other vessel with the intent (in the service of a district or people of the Island of Hayti, to wit, certain rebels who are in a state of insurrection against the organized and recognized government of the Republic of Hayti), that said schooner or other vessel, should cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, and the said property, munitions of war as aforesaid, being then and there on the said vessel for the purpose of being used in fitting out and arming

the said vessel, or some other vessel, as a cruiser, to cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, with which the United States of America are at peace, contrary to the form of the statutes of the United States in such cases made and provided.

Third. That the said property, to wit, 214 boxes of munitions of war, consisting of shot and shells, cartridges, rifles, friction primers and necessary flannel bags, and against two cannon and complete fixtures, and inventory whereof is herewith filed as aforesaid, is now lying at the port of Richmond, Virginia, on a certain schooner called the "E. G. Irwin," in the waters navigable from the sea by vessels of the burthen of ten tons and upwards, or was so in the said schooner at the time of the seizure thereof, and the said property, munitions of war, as aforementioned in this proceeding, are within limits of the United States, to wit, the Eastern District of Virginia, and within the jurisdiction of this court, said property, munitions of war, as aforementioned, being then and there on the said schooner, and the said schooner being then and there, one S. H. Dodd, as master, engaged in violating the neutrality laws of the United States by fitting out or arming, or by being knowingly engaged and concerned in the fitting out and arming of the said schooner, or some other schooner or vessel, with the intent (in the service of a district or people of the Island of Hayti, to wit, certain rebels who are in a state of insurrection against the organized and recognized government of the Republic of Hayti); that said schooner or other vessel should cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, and the said property, munitions of war, as aforementioned, being then and there on the said vessel for the purpose of increasing and augmenting the forces of some cruiser, ship of war, or other armed vessel by adding to the number of guns on such vessel or by changing those on board of her for guns of a larger caliber, said vessel to be then and there used to cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, with which the United States of America are at peace and against the form of the statute of the United States in such case made and provided.

Fourth. That the said property, to wit: 214 boxes of munitions of war consisting of shot and shells, cartridges, rifles, friction primers and necessary flannel bags, and against two cannon and complete fixtures, and inventory is filed as aforesaid, is now lying at the port of Richmond, Virginia, on a certain schooner called the "E. G. Irwin" on the waters navigable from the sea by vessels of the burthen of ten tons and upwards, or was on the said vessel at the time of the seizure thereof, and of the said property, munitions of war as aforementioned, in this proceeding, within the limits of the United States and within the limits of the United States, to wit, in the Eastern District of Virginia and within the jurisdiction of

this court, the said munitions of war being then and there secreted on the said vessel, the "E. G. Irwin," one S. H. Dodd, master, either by the said S. H. Dodd as master, or by some person, or persons, to the attorney of the United States unknown for the purpose of being then and there shipped to some other point, or points, within the admiralty and maratime jurisdiction of the United States and within the jurisdiction of this court, with the intent that the same should be then and there used in fitting out, furnishing and arming said vessel, or some other vessel, said vessel, or such vessel, to be employed in the service of some other country or people, with the intent (in the service of a District or people of the island of Hayti, to wit, certain rebels, who are in a state of insurrection against the organized and recognized government of the Republic of Hayti) to cruise and commit hostilities against the subjects, citizens and property of the Republic of Hayti, with which the United States of America are at peace, and contrary to the form of the statutes of the United States in such case made and provided.

Fifth. That all and singular the matters and things are and were true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court, and that by reason of the premises, and by force of the statutes in such case made and provided, the said 214 boxes munitions of war, fully described as aforementioned, have become forfeited.

Wherefore, the said attorney of the United States prays the usual process of attachment against the said 214 boxes munitions of war, consisting of shot and shells, cartridges, rifles, friction primers and necessary flannel bags, and two cannon and complete fixtures, and inventory thereof, is regularly filed, and the monition of this Honorable Court, in this behalf to be made, and that all persons interested in the said 214 boxes of munitions of war may be cited to answer the premises, and all due proceedings being had that the said 214 boxes of munitions of war may be, for the causes aforementioned, and others appearing, condemned by the definative sentence and decree of this Honorable Court, as forfeited to the use of the said United States according to the form of the statute of the United States in such case made and provided.

EDMUND WADDILL, JR.,
U. S. Attorney.

In the District Court of the United States for the Eastern District of Virginia.

THE UNITED STATES vs. 214 BOXES MUNITIONS OF WAR, &C.	Upon an Information Libel.

This cause having been heard on the pleadings and proofs, and argued orally, and also submitted on briefs by the advocates for the respective parties, and due deliberation being had in the premises, and after due consideration thereof—

It is ordered, adjudged and decreed that the said 214 boxes munitions of war, &c., be and the same are hereby condemned as forfeited to the United States: and it is further ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time limited and prescribed by law and the rules and practice of this court, the clerk of this court shall issue a writ of venditioni exponas, directed to the marshal, for the sale of the said 214 boxes of munitions of war, and that the proceeds of such sale be distributed according to law, and that the costs of the plaintiffs be taxed and paid, subject to the approval of the court, out of the proceeds of the sale.

RO. W. HUGHES,
Judge.

RICHMOND, *4th Feb'y., 1884.*

United States of America.

DEPARTMENT OF JUSTICE,
December 17, 1883.

Pursuant to the Act of Congress of February 22, 1849, I hereby certify that the annexed paper is a true copy of the original letter, on file in this office, from the Hon. Fred'k. T. Frelinghuysen, Secretary of State, dated December 14th, 1883.

In witness whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

[SEAL.]

BREWSTER,
Attorney General.

[Copy.—M. R. F.]

DEPARTMENT OF STATE,
WASHINGTON, *December 14, 1883.*

Hon. BENJAMIN HARRIS BREWSTER,
Attorney General.

SIR: Referring to your letter of the 20th ultimo enclosing a copy of one of the 17th of that month addressed to you by Edward Waddill, Jr., Esq., United States Attorney for Virginia, in which Mr. Waddill requests information in regard to the pending insurrection or rebellion in Hayti I have the honor to acknowledge the receipt of that of the 11th instant on the same subject and to state in reply that I received in a dispatch dated the 31st of March last from the minister of this government to that republic information that a formidable insurrection lead by one General Bozelais had broken out on the 27th of that month (March, 1883). The latest information which I have on the subject is a dispatch from Mr. Langston November 20th saying that the government forces were about to bombard Jeremie and Jacmel coast towns in possession of the rebels.

The government of which President Salomon is the head is that recognized by the United States as the regular government of Haiti.

I have the honor to be sir,
You obedient servant,
FREDK. T. FRELINGHUYSEN.

A copy.
Teste:
[SEAL.] HENRY FLEYENHEIMER,
Clk. U. S. Dist. Court, Eastern Dist. of Va.

UNITED STATES v. TWO HUNDRED AND FOURTEEN BOXES OF ARMS, &C., and UNITED STATES v. ONE HUNDRED KEGS OF GUNPOWDER. 20 FEDERAL REPORTER, p. 50.

February 4, 1884. District Court of U. S., Eastern District of Virginia.

HUGHES, J. These are libels of information brought by the United States attorney, for and in behalf of the United States against two cannons, sundry cases of fire-arms and ammunition, and kegs of gunpowder, found on board the schooner E. G. Irwin, lying in the port of Richmond, and seized for forfeiture in August last. The two proceedings are founded upon section 5283 of the Revised Statutes of the United States, which, so far as applicable to this

case, provides that every person who, within the limits of the United States, attempts to fit out and arm, or is knowingly concerned in the furnishing, fitting out, and arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign people to cruise or commit hostilities against the citizens of any foreign state with which the United States are at peace, shall be punished as provided by law; and that all the materials, arms, and ammunition which may have been procured for the equipment of such a vessel shall be forfeited.

The case of the prosecution is claimed to be that the steam tug Mary N. Hogan, lying in the port of New York in July last, was made ready to be sent out to the waters of Hayti to cruise and commit hostilities in those waters, as a gunboat, in behalf of the insurrectionists of that Island, against the republic of Hayti; and that the two cannons, the cases of fire arms and ammunition, and the kegs of gunpowder, which were seized on board of the Irwin under process of this court, were intended to be put upon her as her armament and outfit, and to have been taken on board of the Hogan from the Irwin at some point on the Atlantic seaboard near Hog Island or Hampton Roads; and that they were shipped at New York on the Irwin for that purpose; and that Capt. Dodd, the master of the Irwin, knew of such character and destination of this part of his cargo, and therein willingly and knowingly assisted in the attempt to arm, fit out, and furnish the Hogan, although it is conceded that he was ignorant of the particular steamer which he was thus to aid in furnishing, and of her name. The prosecution have produced evidence tending to prove, among others, the following facts, namely:

On the fifteenth day of March, 1883, an expedition left Philadelphia on the steamer Tropic, with arms and ammunition, nominally bound for Kingston, Jamaica. The steamer, instead of going to Kingston, went to the island of Inagua, lying between Hayti and Jamaica. There she took on board Gen. Bazelais, with some 75 armed men, and afterwards took on about the same number of men from an English steamer at sea. She then proceeded to the port of Marigoane, Hayti, with all men, arms, and ammunition, and landed them about daybreak, when, under the command of Gen. Bazelais, they successfully inaugurated the rebellion against the government of Hayti, which continued to maintain itself through the year 1883. This Gen. Bazelais had, before leaving Jamaica, supplied one Simon Soutar, a merchant of Kingston, with money for purchasing arms and ammunition. Those which went out on the Tropic were purchased in New York by one Henry A. Kearney, on Soutar's order, from Joseph W. Frazer, a dealer in such goods, and were shipped by Frazer to Phildelphia, and shipped by Kearney at Phildelphia on the Tropic. The master and mate of the Tropic were afterwards tried in Philadelphia, and convicted and sent to the penitentiary

for the violation of section 5286 of the Revised Statutes of the United States, of which they were found guilty. See *U. S.* v. *Rand*, 17 Fed. Rep. 142. Early in the summer of 1883 Soutar appeared in New York, and was in conference with Kearney, Frazer, one George W. Brown, and one Wellesley Bourke. Kearney had been vice consul of the United States, during some years before 1883, in Hayti. Afterwards he had been consul of Hayti in New York. Brown had conducted business in Jamaica, and knew Soutar, and had known Kearney for 10 years. Brown's business in New York in July last was that of an insurance agent, but he took part in the affair about to be mentioned as an outside job. Bourke was the agent of the Haytian insurrectionists in New York. A sequel of the intercourse of these men was that a steam tug called the Mary N. Hogan, capable of carrying some 75 tons or more in weight or freight, not in large bulk, was purchased, with money supplied by Soutar through the agency of Kearney, at a cost, all told, of $11,600. There were also purchased by Kearney, with funds supplied by Soutar, the guns, arms and ammunition which are the subjects of the present libels at a cost of $7,000. They were bought of Joseph W. Frazer, the same person who had sold the light articles which had gone to Marigoane on board the Tropic. Kearney, wishing to keep in the background, got Brown to engage a vessel by which these military goods might be sent out of New York billed for some home port; and Brown, through a regular ship-broker in New York, engaged the schooner E. G. Irwin, Silas H. Dodd, Master, for that purpose. It was concerted between Kearney, Brown, and Dodd that after these military goods were put on board the Irwin, and after the schooner should have proceeded down the coast for some distance, say to Hog Island or Hampton Roads, she should be hailed, by means of concerted signals, by a steamer bound from New York for Hayti, and that the munitions of war on board of her should be transferred to the steamer. Dodd, however, was not informed what steamer was to relieve him of his military cargo, or of its name.

The Hogan, before being purchased by Kearney for Soutar, was examined by Edward A. Bushnell, a friend of Kearney, who had sometime before been chief engineer of the Haytian Navy. John H. McCarthy, an adventurous and somewhat dissipated character, was employed as master, and the bill of sale of the Hogan, when purchased, was made in the name of McCarthy as owner; but he executed a mortgage for the amount of the purchase money, on the vessel, in favor of a Mr. Abbott, a merchant of Jamaica and friend of Soutar. Patrick Cox was employed as chief engineer and Finton Costigan as gunner. Several weeks were consumed in making repairs and preparations, and on the twentieth of July the Hogan, with a crew and a supply of coal, but without other freight, was ready to leave for her destination, when she was seized and libeled by the United States for an attempted violation of the neutrality

laws, under section 5283 of the Revised Statutes. Prevented in this way, as the Hogan was, from proceeding on her intended voyage, there was no steamer to overhaul the schooner Irwin in her sail down the coast, and to relieve her of the arms and military munitions which constituted part of her cargo. She had taken on pig-iron and cement at New York for Richmond at the time when she had been engaged to take the military munitions; and these latter had been consigned, as a matter of form, to "order" in Richmond. The Irwin, therefore, looked out in vain for a steamer during her voyage down the coast; and after standing off Hog Island for a couple of days, and lying at anchor in Hampton Roads for a week, she came with all her cargo, on to Richmond. Here she discharged her legitimate cargo, but was herself arrested and libeled by the government at the same time that the contraband portion of her cargo was seized.

In opposition to this train of testimony the defense deny that the Hogan was intended for warlike cruising in the waters of Hayti against that republic; insist that she was purchased for the purpose of being sent out and used in the port of Antonio, Jamaica, to raise a steamer, the Calvert, which had been sunk in the harbor there in a collision, and which had been purchased at auction, as she lay, by Soutar; and, not controverting many of the facts brought out in evidence by the prosecution, yet insist that the purchase of the arms and munitions seized on the Irwin was for the purpose of their being shipped, as commercial venture, to Jamaica, on board the Hogan. The case is the same in its principles, and substantially the same in its evidence, with that of *The Mary N. Hogan*, which was tried in the District Court of the Southern District of New York in November last, and in which there was a decree of condemnation and sale against the Hogan. The case is reported in 18 Fed. Rep. 529. The evidence was so fully discussed in the opinion of Judge Brown, delivered in that case, that I am relieved of the necessity of a minute detail of so much of it as goes to show the purpose and destination for which the steam-tug Hogan was intended. I probably have a right to regard that part of the case before me as *res judicata*; but feeling disposed, in the cases at bar, to consider the question of the character and destination of the Hogan as an original one, I have gone anxiously and thoroughly over all the voluminous evidence before me on that subject, and find myself constrained to adopt precisely the conclusions that were reached by Judge Brown, and are set forth in his opinion in that case.

Counsel for defense insists that there is no direct proof of an illegal purpose in fitting out the Hogan. That would be an insufficient objection if the circumstances were such as to leave no other reasonable hypothesis than that of her guilt, and if they pointed conclusively to that fact. But there is very much direct evidence. The chief engineer, Patrick Cox, and the gunner, Finton Costigan,

of the Hogan, testified positively and circumstantially that McCarthy, the master of the Hogan, told them that they were to fight the vessel against the Haytian government; that she was going there for that purpose; that a bounty of $5,000 would be divided, on reaching there, between her four principal officers; and that they hired themselves for that express enterprise. Declarations of McCarthy to the same effect, made to others when off his guard from liquor, were also proved. The pretense that the Hogan was to be used in the port of Antonio to raise the Calvert is insufficient to overcome the circumstantial and positive evidence sustaining the hypothesis of the prosecution, that she was intended to be used as a gun-boat in the waters of Hayti. The Calvert cost, as she lay, $500 or £500,—the evidence seeming to be confused as to the two sums,—but I suppose the true price was £500. In order to save this £500, it is pretended that Soutar went nearly a thousand miles to New York, and paid $11,600 for a tug boat to be used for the purpose of raising the Calvert; putting on that tug boat when about to sail no sort of apparatus such as salvors employ in lifting ships from the bottom of the sea. If the raising of the Calvert had been Soutar's real object, the service of experienced wreckers provided with wrecking schooners, and wrecking pumps, anchors, cables, falls, and other expensive material such as are kept on hand only by professional wreckers, would have been sought in Havana, Savannah, Charleston, Norfolk, or New York, and employed, on a contingent compensation, to effect the raising. It will not do in an Admiralty court, accustomed to the trial of wrecking and salvage cases, to insist that a sensible man would content himself with purchasing a single steam-tug (an instrument of most subordinate utility in such an enterprise) in the expectation of raising with it an ocean steamship from the bottom of a harbor. Sunken vessels are not raised by steam tugs. All the apparatus of professional wreckers are required for the purpose. A court will generally make charitable presumptions in favor of accused persons, where there is a question of forfeiture, but I find myself unable to accept the presumption that a steam tug was bought in New York at a cost of $12,000 for the purpose of raising a steamship from the bottom of the harbor of Antonio, Jamaica, which cost only £500, and was to be sent out for that purpose without a particle of wrecking apparatus on board, except some sort of windlass, but loaded down with military guns and ammunition. The Hogan bore less than two feet of free-board. A cargo of 20 or 30 tons, which was the weight of these munitions, would have put down her deck to within 12 inches of the water. Even on a smooth July sea, a voyage to the West Indies would have been a desperate commercial venture, and yet we hear nothing of insurance either upon vessel or cargo. Commercially, the enterprise would have been reckless. As a military venture, it was no more desperate than military raids usually are, especially upon the

high seas. In short, it is impossible to read the evidence in these cases, in a judicial spirit, without being impressed with the irresistible conviction that the Hogan was bought and prepared in New York for the purpose of being sent directly to Hayti, with cannons, gun-carriages, small-arms, ammunition, and powder, which were to be taken on board at some point on the coast from some other vessel, and with this armament was intended to be used as a gun-boat in the waters of Hayti, in aid of the insurrectionists of that island, against that republic. Technically, this question comes to me as *res adjudicata* under the decree of the District Court of the Southern District of New York, rendered on the twenty-third of November, 1883. Actually, it is proved to me by evidence which leaves room for no other conclusion.

I come, therefore, to the additional questions on which the cases at bar depend, namely: *First*, whether or not the military material which is the subject of these libels was intended to be sent out as merchandise, in a commercial venture, and destined to some point in the West Indies for sale as merchandise. If not, whether this military material was intended to be sent directly to Hayti, as the military outfit of the gun-boat Hogan, for use in the hostile and insurrectionary enterprise for which that vessel was destined. No principle of the law is more clear or well settled than that merchandise, including munitions of war, may be sold to belligerents without violating the laws of neutrality. If those munitions had been sent on a vessel of commerce, which itself was not to engage in hostile operations, for the purpose of being landed and sold in a neutral port, even to a belligerent, they could not be confiscated. The general test of contraband as to neutral is whether the contrabrand goods are intended for sale in a neutral market, or whether the direct and intended object is to supply the enemy with them. If the latter is the immediate object, and the property is destined to go directly to the belligerent for his immediate use, the case is within the inhibitions of the neutrality code, and the other belligerent may confiscate. In the case at bar the question is in direct form, while the principle is identical. It concerns the furnishing, fitting out, and arming, in a neutral jurisdiction, of a vessel about to proceed directly to the theatre of hostilities, and to engage in military operations. The Hogan, as already concluded, was intended for such a purpose, and on receiving these arms was intended to be directly bound to the waters of Hayti. These military goods were not to be taken to a neutral port to be sold in open market; they were not for sale at all. They were intended to be used on that steam tug in flagrant hostilities. When they left Frazer's warehouse they ceased to be articles of commerce. They were no longer for sale. They were to be put in a covert and deceptive manner upon a vessel at sea, and to constitute her outfit for engaging in hostilities against a state with which the United States are at peace.

It is useless to cite legal authorities on this subject. The law is in the form of an express statute. Its principles are plain and elementary, and need only to be stated to be comprehended and approved. It is not denied by the defense that these munitions were intended to be put upon the Hogan when she should have got fairly out at sea. Admitting that fact, they deny that the Hogan was destined to Marigoane, and insist that she was going on a wrecking expedition to raise a steamship from the bottom of the harbor of Antonio. That pretense was rejected by the court in New York, and is as emphatically rejected by this court. The Hogan was to go directly to engage in hostilities in the waters of Hayti; and these munitions were to be put upon her as her military furniture and outfit.

The only remaining question, therefore, is, did those who purchased the goods and shipped them on the Irwin, and did the Irwin's master, Capt. Dodd, know of this destination of the goods? Did they attempt to fit out the Hogan with these goods? Were they "knowingly concerned in furnishing, fitting out, and arming" the Hogan, or attempting to do so, with these goods? "Attempt to fit out and arm," "knowingly concerned in the furnishing, fitting out, and arming of any vessel with intent that such vessel shall be employed to cruise or commit hostilities against a state," etc, are the searching and comprehensive terms of the law applying to these libels. It were a waste of words, in view of the cumulative evidence in these cases, to state the proofs of the complicity of Soutar and Kearney in the purchase and preparation of the Hogan for her expedition; and of Soutar, Kearney, and Brown in the purchase, shipment on the Irwin, and intended shipment on the Hogan at sea, of the munitions mentioned in these libels. I shall perform no such act of supererogation. They made the "attempt;" they were "knowingly concerned" in it. The only question is as to Capt. Dodd's complicity; though that is not an essential part of the case. These munitions were sent from Fraser's warehouse in New York to the Irwin, which had come up to an East River wharf for the purpose of receiving them. Most of them were put on at that wharf; but the schooner fearing to lie long at that point, because of the powder on board of her, went off without receiving the remainder of the goods, and set sail down the coast. On going into the Delaware breakwater to Lewes, where the captain took on his family, the munitions which had been left were found to have been forwarded there by express, and were there taken on. There were two cannons. Some of the cases contained cannon-balls; others, ball cartridges, and others, fire-arms. Their weight became the subject of instant remark by the crew, who at once divined that, though shipped as hardware they were really arms, ammunition, and missiles of war. Capt. Dodd could not have been ignorant of their nature. The Irwin sailed on the 18th, and on that afternoon

Capt. Dodd informed his able seaman, Thomas Smith, that these munitions were to go to Hayti, to be used there by the rebels against their government. He also gave the same information to his mate, Moses Monks, and directed him and Smith to be on the lookout for a steamer which was to come along bound to Hayti, and to take these munitions off the schooner. These men testified as to the red and white flag with which Brown had provided Dodd, and that it was kept flying at the flagstaff. Dodd told them that the expected steamer would recognize them by this flag, and was to hail them by dipping her own flag three times. These men testify to their own knowledge of the hostile destination of these munitions for the Haytian rebels, and that they derived it from Capt. Dodd, and that the steamer which was to hail them was to take these munitions directly to the waters of Hayti. This evidence is direct, positive, emphatic. It is not a matter of mere inference that Capt. Dodd was knowingly concerned in an attempt to furnish, arm, and fit out a steamer, which was expected to come along-side of him, and take these munitions on board as her armament for committing hostilities against the government of Hayti. That Capt. Dodd did not know what particular steamer this was to be is immaterial. If a black steamer, sailing under a black flag, without name or home port, had come alongside of him at night, and, on complying with concerted signals, had taken these munitions on board and sailed off, without his being able to learn her name or identity, and she was proved to be destined, with Capt. Dodd's knowledge, on such an expedition as that for which the Hogan was intended, Capt. Dodd's guilty participation in this enterprise would have been no greater than it was in respect to the steamer Hogan, which was equally unknown to him. If the claimant, Soutar, and his agent, Kearney, were engaged in the attempt, by shipping them down the coast on the Irwin to put these munitions on the Hogan to be used on her in committing hostilities in Hayti, I do not know that it is necessary to establish a guilty knowledge of their scheme in Capt. Dodd. He might be innocent, though the goods were guilty; but whether necessary to the condemnation of the goods or not, I hold that the guilty knowledge and participation in the plot is clearly established against Capt. Dodd by the evidence. It is useless for me to reiterate what has so often been ruled in principle, that the placing of these goods directly on the Hogan, by those knowingly concerned in fitting out that vessel, was not necessary to justify the condemnation of the goods. If they had passed through the hands of many draymen, and other intermediaries, and over many decks, before reaching the vessel whose outfit and armament they were intended to be, that ultimate destination made them guilty goods, and subjected them to condemnation.

I will sign a decree of condemnation and sale in both of these cases.

District Court of the United States, Southern District of Florida.

THE UNITED STATES against THE STEAMSHIP "CITY OF MEXICO," HER TACKLE, &C.	Libel of information, violation of neutrality laws.

To the Hon. James W. Locke, Judge of the District Court of the United States for the Southern District of Florida.

The libel of information of Livingston W. Bethel, Attorney of the United States for the Southern District of Florida, who prosecutes in behalf of the United States, and being present here in court in his proper person, in the name and behalf of the United States, against the steamship City of Mexico, her tackle, apparel and furniture, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges as follows:

First. That pursuant to the Revised Statutes of the United States C. M. Chester, commanding the United States ship of war Galena, on the —— day of ——, 1886, did seize the steamship City of Mexico as prize of war, and hath brought said steamship into the port and harbor of Key West, where she now lies.

Wherefore, the said attorney of the United States prays the usual process of attachment against the said steamship City of Mexico, her tackle, apparel and furniture, and that the same may, by the definite sentence and decree of this Honorable Court, be condemned as forfeited, to be distributed as by law is provided respecting the captures made as aforesaid.

(Sd.) LIVINGSTON W. BETHEL,
United States Attorney, So. Dist. of Florida.

District Court of the United States, Southern District of Florida.
In admiralty.

To the Honorable James W. Locke, Judge of the District Court of the United States for the Southern District of Florida.

The libel of Livingston W. Bethel, Attorney of the United States of America for the Southern District of Florida, who prosecutes on behalf of the said United States of America, and being here present in court in his proper person, in the name and on behalf of the United States of America, against the steamship "City of Mexico," her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of forfeiture, alleges and informs the court as follows:

First. That the United States steamer "Galena," a commissioned vessel of the Navy of the United States, heretofore, to wit, on the fifteenth day of February, in the present year 1886, being under

command of Colby M. Chester, a commander in the Navy of the United States, did, at the island of San Andreas, off the coast of Costa Rica, seize and take the said steamship "City of Mexico," belonging to a citizen of the said United States, and did send the said vessel into this port, where she now lies within the jurisdiction of this court, for and because of a violation of section 5283, of the Revised Statutes of the United States, in this: that the said steamship "City of Mexico," was at the port of New York, and within the limits of the United States, on or prior to the 22d of December, 1885, fitted out by one Emelio Delgardo (otherwise known as Genl. Delgardo), and Manuel Morrie (otherwise known as Col. Morrie), with intent that said steamship, the said "City of Mexico," should be employed in the service of said Emilo Delgardo, and the said Manuel Morrie, and other persons to the said attorney unknown, to commit hostilities against the government and people of the Republic of Honduras, a republic and people with whom the United States are at peace.

Second. That by reason of having been fitted out as aforesaid the said steamship "City of Mexico," her tackle, apparel and furniture became and was forfeited, as in and by said Section 5283, is provided and declared.

Third. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States.

Wherefore the said attorney of the United States, on behalf of the United States, prays that process in due form of law according to the rules and practice of this Honorable Court, issue against the said steamship the said "City of Mexico," her tackle, apparel and furniture, may issue, and that all persons interested may be cited to appear to answer the premises, and that this Honorable Court may be pleased to decree the forfeiture declared by said Section 5283 of the Revised Statutes, and that the said steamship the said "City of Mexico" may be condemned and sold, and the proceeds thereof be distributed as by said statute is provided, and that otherwise law and justice may be administered in the premises.

Sworn to before me this 1st day of April, 1896.

E. O. LOCKE, Clerk.

(Sgd.) LIVINGSTON W. BETHEL,
Attorney for the United States for the Southern District of Florida.

THE CITY OF MEXICO. 28 FEDERAL REPORTER, p. 148.

(*April 19, 1886. District Court of U. S., Southern District of Florida.*)

LOCKE, J.:

The only ground upon which a libel for prize can be sustained is that of the state of war. Prize only relates to or is connected with such a state or condition. A vessel captured for engaging in piratical aggression becomes a prize on account of the state of universal

war presumed to have been declared by a pir*tae* against commerce and human kind at large which requires no reciprocal declaration from any nation. Whether piracy is considersd as a name applied only to indiscriminate plundering and robbery either upon the high seas or upon the coasts where the high seas are used as the basis of operation where the animus furandi is the distinguishing feature as is expressed and held by President Woolsey precluding the idea of a revolutionary or political sentiment, or whether there may be acts of piracy committed in following out the direct course of the revolutionary struggle as is contended by Judge Brown in the recent case of the Ambrose Light, 25 Federal Reporter 408, there must be some over*t* act either in committing or attempting some offense against the law of nations to give a piratical character to a vessel. An intent alone can never determine such a state of warfare as would justify the seizure of the prize. There is in this case nothing that can be characterized as an overt act of piracy or warfare and the libel for forfeiture as prize must be dismissed.

The second libel is for forfeiture for the violation of a municipal statute embodied in Section 5283, Rev. St.

It is claimed in behalf of the respondent that, if one libel is dismissed, such dismissal necessarily precludes an examination of the other, upon the principle of election or choice of action against the thing. But these libels, although against the same vessel, found under peculiar circumstances, are in no way based upon the same cause of action. The libel for prize is founded upon the law of nations, and depends for proof upon the facts of her acts upon the high seas; the libel for forfeiture is for the violation of a municipal statute, and depends upon a set of facts and circumstances entirely different from that of piratical aggression. The offenses charged are separate and distinct, and the cause of action is in nowise the same. In *U. S.* v. *Weed*, 5 Wall. 62, and *The Watchful*, 6 Wall. 91, the same question is directly settled.

The libel for forfeiture alleges that certain persons were knowingly concerned in the furnishing and fitting out of said vessel, with the intent that she should be employed to cruise or to commit hostilities against the people of the state of Honduras, with whom the United States is at peace. The peace existing with the state of Honduras may be judicially recognized, and there only remains the questions of knowingly furnishing and fitting out of said vessel, and the intent with which she was fitted out.

The terms "furnishing" and "fitting" have no legal or technical meaning which requires a construction different from the ordinary acceptation in maritime and commercial parlance, which is to supply with anything necessary or needful. That by the furnishing and fitting out is intended something different from the arming, is not only apparent from the language of the statute, but it has been judicially determined in *U. S.* v. *Quincy*, 6 Pet. 445. This vessel

was furnished and fitted out, in the usual acceptation of the terms, provided with the necessary supplies, and put in a condition for proceeding to sea, within the United States. Whether she was well furnished or thoroughly fitted out is not the question, if she was so supplied as to proceed on her way. She was furnished with the ordinary engineer's supplies and steward's stores, and sailed from New York the Twenty-second of December, 1885. What was the intent with which she was fitted out, and either dispatched or taken on her way by the parties in charge, becomes a most important and difficult question, involving conclusions both of law and fact.

Whatever may have been the intention of the legislators regarding the particular class of hostilities they were desired to prevent, all we have to decide from is the language with which they have clothed their ideas, and this is broad enough to include all classes of hostilities. It has been ably argued that unless the vessel is so armed that she herself can be the offending party or thing, or, in other words, carries such an armament as can throw projectiles from her port, or is equipped as a man-of-war or armed vessel, the statute will not apply. The terms "peaceful" and "warlike," "friendly" and "hostile," are thoroughly recognized; and the line so plainly marked between what should be the course and conduct of a vessel engaged in a peaceful commercial venture, and one fitted, prepared, and intended for hostilities, is so distinct and well defined as to permit no mistake, nor require a reference to a judicial decision.

A peaceful act, a peaceful voyage, cannot be a hostile one; nor can acts looking towards war or enmity escape from the general term "hostilities." It is true that vessels may frequently be engaged in transporting troops as passengers, and war material as freight, without themselves having any connection with the actual hostilities contemplated, so that their voyages in no way partake of the nature of hostile acts, nor they be liable to be charged with the commission of hostilities. *The Lafayette* and *Ville de Paris*, cited in Hall, Int. Law. 564. Or where troops, conveyed as passengers only, are landed as such, although bound on a hostile expedition, where all connection and relation existing between them and the vessel are to be terminated at their leaving her side, the question becomes one of more difficulty. But when it is intended that a vessel shall herself be part and portion of a hostile expedition; that she shall carry troops, not for the purpose of making quiet and unopposed landing, and leaving them to take the risk of war subsequently, but making for them, or with them, if found necessary, a forcible and hostile landing; standing ready to put them on shore, or receive them on board defeated; to convey and furnish them with arms, ammunition, and stores; to act as a base of supplies and operations, ready to assist in committing any hostile

acts that can be completed by armed men, she sharing all chances of success or defeat, and under the direct orders and control of the commander of a hostile expedition—it cannot be admitted that her acts would be anything but hostilities. A vessel is a passive instrument, and is but made the means of success; and it matters but little, in the effect of her hostilities, whether she throw shot and shell from her ports, or dispatched boat-loads of armed men from her gangways.

It has been conclusively determined that it is not necessary that the vessel be armed or manned for the purpose of committing hostilities before leaving the United States, if it is the intention that she should be so fitted subsequently. *U. S.* v. *Quincy, supra.* So there need be no evidence of such arming or manning.

The intention of parties charged with a crime, when the intent is the gist of the offense, is the most difficult of all matters to prove, and in a vast majority of instances, like the present, can only be shown by a chain of circumstances fitting into each other, against every point of which may be expected the denial of all parties in interest, either positive and direct, or as nearly so as the respect for an oath, and the ingenuity of the witness will permit.

This vessel, ostensibly owned by Christian B. Hollander, of New York, sailed December 22, 1885, from New York for Central America, having for cargo about 7,000 bags of corn. She was cleared for Progresso, Blewfields, and Corn island, and had as passengers Gen. Emilio Delgado, Col. Manuel Moray, Mariana Soto, and 17 others, who were going at the expense and in the employ of Gen. Delgado. The master was intrusted with a bill of sale of the vessel to Gen. Delgado, and a power of attorney to execute it at any time. He also had a letter of instructions, directing him that, after he should have discharged his cargo of corn at Progresso, he should receive his orders from Gen. Delgado, who accompanied him, should visit such ports or places, take such cargoes or such passengers from and to such ports or places as he (Delgado) should direct. Before leaving New York there were several cases of merchandise taken on board; but, after inspection by officers of the custom house, they, which proved to be a cannon, with carriage, furniture, and ammunition, were taken out, and, when the vessel sailed, left behind. It is testified to directly by a number of the crew that while on the voyage Col. Moray and several of the passengers openly spoke of their plans of the voyage; saying that they were going on an expedition to Honduras, and were to fight; that they were going to receive arms from another vessel, and were going first to capture Ruatan; and that the steamship was going to cruise between this island and the mainland to cut off communication. When they reached Progresso, Col. Moray (who next to Gen. Delgado seemed to be in charge of the company) requested the purser or steward to get men, telling him they were to go to Honduras to fight for Gen.

Delgado. They took on board eight passengers at Progresso, who came on Gen. Delgado's account, and spoke of their being soldiers, and showed their wounds and scars. The ship proceeded to Belize, where they took on board 10 or 11 men, also on Gen. Delgado's account, and under his control, one of whom declared himself employed as pilot in Honduras waters, but no cargo. Thence they proceeded to Blewfields, then Corn island, at both of which places they remained some time; several of the party saying that they were waiting for arms and ammunition expected by the steamer Neptune; but finally, she not arriving, they cleared for Kingston, Jamaica, by way of St. Andrews. At the several ports she visited, the authorities forbade the landing of passengers on account of their rumored character and business; and finally at St. Andrews the crew made a formal protest before the consul agent against proceeding further in her, and after a hearing and investigation before the consul, Commander Chester, commanding the United States ship Galena, was advised by him that the circumstances would justify the seizure.

There were found on board, not belonging to them, three flags, blue and white, with five stars, resembling the Hunduras flag; bird's eye views of Ruatan, Truxillo, and other places in Honduras, showing particularly all defenses and fortifications; also maps showing principal cities, towns, and roads; several revolvers; three swords; and in possession of Gen. Delgado a case of surgical instruments and bandages, two sets of field telegraph instruments, 10 half barrels of beef, and 100 barrels of flour, which were claimed as the property of Delgado, and bore the same shipping marks as the cannon and ammunition taken from the vessel before leaving New York. At Blewfields, Gen. Delgado drew $4,000 in silver, part of which had been disbursed for the expenses of the ship. The rest was on board.

These are circumstances connected with the vessel herself and her voyage. Much of the conversations in regard to the future use of the vessel, and the intentions of the parties, has been denied with more or less directness. The defense is that Gen. Delgado held a grant or concession of a large tract of land on the Rio Coco, Nicaragua, and that the expedition was to be one for colonization and agricultural purposes, rather than hostile; that the passengers and parties employed at Merida and Belize were agricultural laborers, and not soldiers; and that their final intended destination was Blewfields; but their not being permitted to land interfered with their plans, and brought about the final suspicious circumstances. Were there no other circumstances connected with the case that bore upon it, perhaps, in the leniency of courts, and the disinclination to enforce forfeitures, such view might be accepted; but there were chains of evidence leading to the City of Mexico from another direction.

It appears in evidence that before the vessel left New York, Mr. Marks, a member of the firm of Straus & Co., the agents of the vessel in that city, and through whom all the business was transacted, procured from Mr. Jex, of the firm of Wm. Jex & Co., who had permanent business relations, and a resident agent at Corn island, a letter introducing Gen. Delgado, to their agent, Capt. Nelson, at Corn island; and upon the strength of that letter advised him that they (Straus & Co.) had advised their agent at Kingston to ship to him some goods which they requested him to hold at the disposal of Mr. Delgado for reshipment per City of Mexico or otherwise; and, when confronted by Mr. De Long, of the same firm, regarding this letter, admitted that they had purchased the arms, and shipped them to Kingston, intending they should be landed at Corn island, and explained that it was but a friendly turn to ex-President Soto, who had employed them to purchase the arms and City of Mexico, in which business they only acted as agents. There is an attempted contradiction or denial of a portion of this by Marks; but in view of his false testimony when first before the commissioner, in which he denied that he knew of Delgado, when the proof is positive that he made application to Mr. Jex for a letter of introduction, and explained that he would not need any money, there can be no question as to which witness to believe. This explains what goods he was to ship to Delgado at Corn island; and why they were not received is explained by the testimony of A. D. Straus, of the same firm, who states that this cannon and ammunition put ashore from the City of Mexico was afterwards shipped by a steamer of the Atlas Line, consigned to order at Kingston, but was returned by another vessel of that line because the government would not allow arms to remain there by special permit. After the return of the arms from Kingston, the next attempt to forward them to the City of Mexico we find undertaken by the Norwegian steamer Fram, chartered by Lord & Austin for 40 days to carry a load of arms and ammunition to deliver to order at St. Andrews, Corn island, or Blewfields, calling at Turks Island on the way out to get some laborers, presumably to take along with the arms. The master of the Fram is not, under the circumstances, to be presumed to know where the arms were going; but one of these laborers, James Bogan, who had been sent ahead to Turks Island by the Santo Domingo, testifies that he was to wait at Turks Island, to be shipped thence on the Fram, and from the Fram to the City of Mexico, where he was to report to Gen. Delgado. He tells the same story in his testimony about the intended attack upon Honduras, with some exaggerations, but with no communication with any of the crew of the City of Mexico, nor any inducement that I can perceive for false swearing. The Fram proceeded to St. Andrews, Corn island, and Blewfields, but in the mean time the City of Mexico had been seized, and was on her way to

Key West, and consequently the order to whom the arms and ammunition were consigned was not found, and they were returned and left at Kingston. Before the City of Mexico left New York it was intended to have goods sent her, to be received at Corn island by Gen. Delgado. If they were not the arms and ammunition, what prevented their being regularly shipped, and why not received? If Gen. Delgado's voyage was to terminate at Blewfields, and he was to proceed from there to Rio Coco, why were his goods shipped to Corn island? If he was, in good faith, attempting to colonize a large tract in Nicaragua, had he not enough influence with the authorities to obtain permission to land at their only seaport. But one conclusion can be arrived at; the City of Mexico was intended for receiving arms at Corn island, or St. Andrew; and, under the order of Delgado, was waiting for them, whether they came in the Neptune or some other vessel.

What were the intentions for her future course? Bogan says that he was told they were to make an attack on Honduras. It is urged that Bogan has not been connected with the City of Mexico sufficiently to make his testimony relevant; but I think the combination of circumstances proven shows that he was employed or hired to join her on the expedition, under leaders engaged in the same enterprise and the declaration of such parties may be considered. The crew of the City of Mexico say that those partially in command of a part of the expedition openly announced the intention to attack Honduras. Although not in Honduras waters, nor to go there on any legitimate voyage, they had employed a party who declared himself to be a Honduras pilot. They had bird's eye views of the fortifications and places along the coast of Honduras. The whole character of the voyage shows it was not a commercial one. No cargo was taken, no cargo looked for,—only arms and ammunition, which are not the implements of peaceful colonization or agriculture. The arms were not shipped or to be received for sale as a financial speculation. There was no war in that part of the world going on or in contemplation, except what was intended by Gen. Delgado, for whom they were intended.

I can arrive at but one conclusion: that acts of hostility were contemplated and intended at the time of furnishing and fitting out the City of Mexico, in which she was to take an active part, and that it was intended that she should receive arms and ammunition, and, in the language of the statutes, she should commit hostilities.

The decree of forfeiture must follow.

165-721

165-721

165-721

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE STEAMSHIP "THREE FRIENDS," her boats, tackle, etc.
No. 701.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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THE UNITED STATES, APPELLANT,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

It has been necessary to prepare the present petition in great haste on account of the long recess of this court which is impending, and on account of the very great importance of obtaining an early and at the same time a final settlement of the question raised by this decision of Judge Locke. It is not intended fully to argue the merits of this question now. There is not time enough to prepare an argument upon it which would both fully and adequately present the case of the Government; nor would it be fair to the counsel for the appellee to demand a complete argument from him at this time. Judge Locke's opinion shows that the point is new; that it was never raised in any case under the "neutrality" chapter until 1889 in *The Carondelet*, 37 Fed. Rep., 799; that

prior thereto § 5283 had been assumed by everybody to apply to cases like this; and that while the point was considerably discussed from 1889 to 1893, it was never before decided.

It is believed that the petition sufficiently states the reasons for issuing this writ, provided that the court has jurisdiction in the premises. The present brief is confined to the jurisdictional question suggested by the court.

I.

This case is one in which the court has jurisdiction to issue a writ of certiorari.

Being an appeal in an admiralty case, the decision of the Circuit Court of Appeals is final within the act of March 3, 1891, c. 517, § 6, but that act provides:

> That in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

II.

This court has power to issue a writ of certiorari before final judgment in the Circuit Court of Appeals. While it will not ordinarily do so, the application is addressed to its discretion.

This is discussed and decided in *American Construction Co.* v. *Jacksonville, etc., Ry. Co.*, 148 U. S., 372. Mr. Justice Gray said (p. 385):

> Doubtless this power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely, indeed, before the case was ready for decision upon the merits in that court. But the question at what stage of the proceeding and under what circumstances the case should be required by certiorari or otherwise to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require.

III.

It is not necessary that any step should be taken by the Circuit Court of Appeals before the issuance of the writ of certiorari.

The decision that no final judgment need be entered in the Circuit Court of Appeals before the issuance of the writ involves the decision that the writ can be applied for as soon as the record reaches that court. There is no language in the statute upon which an intermediate limitation can be based. This court has "the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." In other words, it really reviews, not the decision of the Circuit Court of Appeals, but the decision of the court of first instance. Its mandate is directed to the latter court (§ 10).

This is exemplified by certain cases which have already arisen under the act of 1891.

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This is exemplified by certain cases which have already arisen under the act of 1891.

In *Chicago & Northwestern Ry. Co.* v. *Osborne*, 146 U. S., 354, the writ was denied by this court, because (as is shown by the authorities cited by the Chief Justice) there was as yet no final judgment in the Court of Appeals. That court's judgment did not end the actions, but "remanded the cases for further proceedings in accordance with its opinion." Recently, however, in the cate of *Forsyth* v. *City of Hammond*, No. 615 of this term, a writ of *certiorari* was issued under similar circumstances, although counsel opposing the application relied upon the Osborne case.

IV.

The Circuit Court of Appeals has jurisdiction of the case, and the application, although hurried, is not premature.

The petition states that "the cause is now pending in the Circuit Court of Appeals for the Fifth Circuit." The transcript of record presented to this court is a duplicate of the transcript of record filed in that court. If a writ of *certiorari* be directed to that court, the return will be a precise copy of what is now before this court, with the addition of the file mark and certificate of the clerk at New Orleans. The transcript is certified by the clerk of the District Court; and the additional certificate of the clerk of the Circuit Court of Appeals can add nothing of value at the present stage.

It is, of course, preferable under ordinary circumstances that legal proceedings should be conducted with the fullest regard for formalities. But the circumstances

under which this application is made are extraordinary, the grave reasons of state policy which induce it making it highly important that the law should be settled by this court with the least possible delay.

The present case is one justifying immediate action under the rules laid down by this court.

In the American Construction Co. case above cited, the writ of *certiorari* was refused because the alleged error of the court below was "neither so important in its immediate effect, nor so far-reaching in its consequences as to warrant this court in undertaking to control the cause at this stage of the proceedings." (148 U. S., at pp. 385–6.)

It is submitted that no case could be more "important in its immediate effect" than the present one. A comparison of the provisions of § 5283 with those of § 5282 would seem alone to be sufficient to establish this proposition. The nation can not honorably allow its individual citizens to enlist in a foreign war unless the circumstances justify the nation itself in declaring war. The national dignity requires that enlistments, as well as hostile cruises, expeditions and enterprises in aid of insurrectionists, should be prevented. The disturbances in the island of Cuba are now at their height.

A decision of this court upon a writ of *certiorari* issued after the case shall have been heard and finally decided in the Circuit Court of Appeals, would be very probably too late to have any effect except as an authority in case of future foreign insurrections. This is well exemplified

by the case of the Itata, referred to in the petition. There (not for lack of power, but in the exercise of its discretion, as is understood) this court in October, 1892, declined to issue its writ. There was no urgency, as the hostilities were already over. The Circuit Court of Appeals did not decide the cause until so late that it could not have reached this court for argument until October, 1893. The hostilities then were so long over, and the revolutionary party had so long been the recognized government of the country, that the case was dropped.

Respectfully submitted.

JUDSON HARMON,
Attorney General.

EDWARD B. WHITNEY,
Assistant Attorney General.

165-721

Office Supreme Court, U. S.
FILED
JAN 30 1897
JAMES H. McKENNEY,
CLERK.

165-721

701

Supreme Court of the United States.

THE UNITED STATES

vs.

THE STEAMSHIP "THREE FRIENDS."

BRIEF IN OPPOSITION TO THE MOTION OF THE UNITED STATES FOR A CERTIORARI.

W. HALLETT PHILLIPS,
For Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

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THE STEAMSHIP "THREE FRIENDS."

BRIEF IN OPPOSITION TO THE MOTION OF THE UNITED STATES FOR A CERTIORARI.

The appellant moves for a certiorari to the circuit court of appeals for the fifth circuit to bring up an admiralty cause, which it is alleged is there pending, but not yet decided.

A libel for condemnation of the vessel, a steamtug valued at $4,000, was filed by the United States in the southern district of Florida, alleging that the vessel was subject to forfeiture because, on the 23d of May, 1896, furnished, fitted out, and armed with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the Island of Cuba, to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain, in the Island of Cuba, with whom the United States are and were at that date at peace.

It was also alleged, after exceptions filed, that the vessel was

fitted out, furnished, and armed within the jurisdiction with intent that she should be employed "in the service of a certain people, to wit, the insurgents in the Island of Cuba, otherwise called the Cuban revolutionists, to cruise," etc.

A subsequent paragraph varies the allegation slightly.

Exceptions were filed to the libel on the ground, among others, that section 5283, Revised Statutes, did not apply, because the libel failed to show, within the intent of the statute, that the vessel was fitted out and armed or furnished with intent that said vessel should be employed in the service of a foreign prince or State or of a colony, district, or *people* with whom the United States are at peace.

January 18, 1897, the cause coming on to be heard upon exceptions, it was ordered that the exceptions referred to should be sustained.

An appeal was allowed to the United States for the purpose of removing the case to the circuit court of appeals for the fifth circuit.

Almost immediately thereafter, and before the case could possibly reach the court of appeals, the Government gave notice that application would be made here for a writ of certiorari, to bring up the case *from the circuit court of appeals.* A record is transmitted with the motion now made, but it is simply a transcript of the record in the *district* court. There is nothing in it to show that a record has even been filed in the circuit court of appeals or the appeal otherwise prosecuted and perfected in that court.

The Government moves for a certiorari to the circuit court of appeals to bring up an admiralty cause there pending and not yet heard.

We submit that a certiorari cannot properly be allowed in such a case before some action is taken in the circuit court of appeals, either by a decree, judgment, or certification of questions.

A similar motion was made by the Government in a simi-

lar case—that of the *Itata*—at October term, 1892. It was denied without prejudice to a renewal.

Although no reasons were assigned, it is understood the Court refused the application because no decree had been made or other action had been taken in the court of appeals. (The *Itata*, 149 U. S., 789.)

The same question on the merits now presented was involved in that case, to wit, the right to proceed against the vessel under section 5283 of the Revised Statutes, whether the word "people" there used applies to the acts of individuals not connected with the operations of a foreign power or belligerent.

An elaborate brief was filed by the Attorney General, in which this Court was invoked to grant a certiorari to the circuit court of appeals on the ground of the importance of the cause.

After the refusal of the motion the circuit court of appeals for the seventh circuit affirmed the decree of the district court. This decision seems to have satisfied the Government, for no further application was made to this Court. (The *Itata*, 56 Fed Rep., 505.)

President Harrison, in his message to Congress, December 9, 1891, was of opinion that the proper course for the Government to pursue was to obtain from Congress an amendment of the law so as to cover the case which the courts had decided did not fall within the wording of the act. He said:

"A trial in the district court of the United States for the southern district of California (The *Itata*, 49 Fed. Rep., 646) has recently resulted in a decision holding, among other things, that, inasmuch as the congressional party had not been recognized as a belligerent, the acts done in its interest could not be a violation of our neutrality laws. From this judgment the United States has appealed, not that the condemnation of the vessel is a matter of importance, but that we may know what the present state of our law is, for, if this construction of the statute is correct, there is obvious necessity for revision and amendment."

No action, however, was taken by Congress amending the legislation on the subject.

The Government now in a similar case undertakes again to pursue the matter in the courts.

It has again been held by a United States court, in accordance with the *Itata* decision, that the statute did not apply to the action of individuals, where there was no war nor belligerency, and consequently no neutrality on the part of the United States between contesting powers or political entities. It held that the word "people," in the connection in which it is used, referred to a power or belligerent and not to mere unorganized individuals engaged in civil commotion.

The question of the merits, however, is not one which can now come before the Court. The circuit court of appeals must first act in the matter.

By the act of March 3, 1891, chapter 517, section 8 (26 Stat., 826), it is provided that in *any case made final* in the circuit court of appeals it shall be competent for the Supreme Court to require such case to be certified to the Supreme Court for its *review* and determination, with the same power and authority as if it had been carried by appeal or writ of error to the Supreme Court. It is the *judgment* or *decree* of the court of appeals which is "made final." It is a "*review*" of the proceeding of the court of appeals which is provided. Such "*review*" is to be the same as if on writ of error or appeal; consequently some action by the court which can be the subject of review must be first obtained. By this clause it was only intended that this Court should grant a certiorari after decision or after the circuit court of appeals had, in pursuance of the previous clause, certified to this Court any question concerning which such Court desired instruction for proper decision, or in pursuance of the power, *after such questions had been certified*, to order the whole record and case to be sent up for consideration.

In no instance has this Court awarded a certiorari in any case in which the decision of the circuit court of appeals is made final under the last clause of section 8, except where some action had been taken in the case by the circuit court of appeals.

This result follows from the manifest object of the power, which is to enable this Court to exercise an *appellate jurisdiction* over the circuit court of appeals.

This construction is made certain by the *special power* vested in this Court, before decision, to order the whole record and case to be sent up for consideration when questions are certified here by the circuit court of appeals.

Such questions are a substitute for the certificate of division of opinion provided for in former acts, the decision of which was, undoubtedly, the exercise of appellate jurisdiction over the action of the court granting the certificate.

In Lau Ow Bew, petitioner, this Court said:

"It is evident that it is solely questions of gravity and importance that the circuit court of appeals should certify to us for instruction, and that it is only when such questions are involved that the power of this Court to require a *case in which the judgment and decree* of *the court of appeals is made final*, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of this Court to issue the writ applied for in order that the case may be *reviewed* and determined as if brought here on appeal or writ of error." (141 U. S., 587.)

The interposition of this Court was there sought after judgment.

It could not have been the intention of Congress to provide for an appeal from the district and circuit courts in cases such as the present arising under the admiralty law to the court of appeals, making the appellate jurisdiction of such latter court final in these cases, and to permit the Su-

preme Court to entertain jurisdiction over them, unless for the purpose of reviewing the proceedings in the circuit court of appeals.

No reason appears why an admiralty case should be taken from the district court to the court of appeals, and before the court of appeals can act on it require it to be transferred here by certiorari.

The appeal to the court of appeals cannot be made mere matter of form for the purpose of getting a case transferred here, which could not come directly from the court rendering the judgment or decree.

If this were permissible this Court would review the proceedings in the district court alone, for the circuit court of appeals has not acted.

In American Construction Co. *vs.* Jacksonville R'y, 148 U. S., 355, the Court remarked that the power to grant the writ of certiorari should be exercised sparingly, and only in cases of peculiar gravity or in order to secure uniformity of decision. In all the cases referred to in which the writ had been granted the circuit court of appeals had taken action. In the Construction Company case, the court of appeals had made a decree on appeal from an interlocutory order, as was allowable under the act of 1891. An application having been made for a certiorari to review such decree, this Court held that in such an "exceptional case" the power of this Court to require by certiorari the case to be sent up for review could not be doubted. "There is nothing in the act to preclude this Court from ordering the whole case to be sent up, when no distinct questions of law have been certified to by the circuit court of appeals, at as early a stage as when such questions have been so certified. The only restriction upon the exercise of the power of this Court, independently of any action of the circuit court of appeals, in this regard, is to cases 'made final in the circuit court of appeals'—that is to say, to cases in which the statute

makes the judgment of that court final, not to cases in which that court has rendered a final judgment. Doubtless, this power would seldom be exercised before final judgment in the circuit court of appeals, and very rarely indeed before the case was ready for decision upon the merits in that court; but the question, at what stage of the proceedings and under what circumstances the case should be required, by certiorari or otherwise, to be sent up for review, is left to the discretion of this Court, as the exigencies of each case may require." (148 U. S., 385.)

Here it is only decided that, in order for this Court to exercise its appellate jurisdiction over the proceedings in the court of appeals, it is not necessary that a *final judgment or decree* should have there been rendered prior to an application here for a certiorari.

As the circuit court of appeals had jurisdiction on appeal in the particular instance of an interlocutory decree and as it was one of the cases made final there, it was entirely clear that this Court had as much right to exercise its supervisory jurisdiction over such case as in any others made final in the circuit court of appeals.

But the decision is far from intimating that the Court here can grant a certiorari under the act to bring a case from the court of appeals, made final there, when no judgment or decree has been rendered by such court, and no action by questions certified or otherwise has there been taken.

If the Court possesses the jurisdiction now invoked by the Government, the case is not one for its proper exercise.

It would be very strange should this Court order a case not acted on in the court of appeals to be sent here by that court when no reason exists why the court of appeals should not be allowed to exercise its proper jurisdiction and when such court has not intimated any difficulty in its decision of the matter.

The final jurisdiction over the cause is vested in that court under the act of 1891.

There has been no difference of opinion in the courts as to the meaning of the language of section 5283, construed by the district court.

If the circuit court of appeals is not deprived of the right to decide the case, it may reach a conclusion satisfactory to the Government. Why, then, should this Court, in advance of such a decision, order the case to be sent here for a hearing?

The object of the act of 1891 was to take away from this Court the disposition of certain classes of cases, including those in admiralty, in order to lighten the labors of the Court, while leaving a limited and defined supervisory jurisdiction over the subordinate Federal tribunals.

It was intended to constitute the Federal courts of appeals tribunals of the highest dignity and consequence, whose decisions in the matters confided to them should be final, except as otherwise provided.

The alleged importance of a cause is certainly not sufficient in itself why such a court should not be entrusted with its determination.

The gravity of the question presented in the district court is much overrated by the Government.

When it is considered that the present is the only prosecution under section 5283 instituted by the Government since the beginning of the disturbances in Cuba, two years ago, it is seen the case is of no far-reaching consequences.

The Court will take judicial notice that there has been throughout that period a diligent enforcement of section 5286, Revised Statutes, prohibiting military expeditions. The law on that subject is announced in U. S. *vs.* Wiborg, 163 U. S., 632. The point involved in the present case is a different one, arising out of the operation of section 5283, which solely applies to a public war and the fitting out of vessels to be used in the service of one of the *powers* at war.

On the other hand, it has never been questioned that the prohibition of military expeditions applies to times of peace as well as war. The statute does not make it necessary, in order to constitute a crime, that such expedition should be for the service of a foreign *power*.

We submit that the application for the certiorari should be denied.

W. Hallett Phillips,
For Appellees.

165-721

Office Supreme Court, U. S.
FILED
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165-721

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE STEAMSHIP THREE FRIENDS, her boats, tackle, engines, etc.
No. 701.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLANT.

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ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLANT.

The steamship *Three Friends* was seized on November 7, 1896, by the collector of customs for the district of St. Johns, Fla., as forfeited to the United States for breach of the provisions of § 5283 of the Revised Statutes, which is as follows:

> Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be *employed in the service of any foreign prince or State, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens,*

> *or property of any foreign prince or State, or of any colony, district, or people, with whom the United States are at peace*, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than $10,000, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States.

The vessel was then libeled by the United States attorney in the district court for the southern district of Florida, but was released upon stipulation, against his protest and opposition; and thereafter exceptions to the libel were sustained. A final decree was entered January 18, 1897, as follows (p. 12):

> This cause coming on to be heard upon exceptions to the libel, and having been fully heard and considered, it is ordered that said second, third, fifth, and sixth exceptions be sustained and that the libelant have permission to amend said libel, and in event said libel is not so amended within ten days the same stand dismissed and the bond herein filed be canceled.

The United States attorney elected not to amend further (he would appear from the opinion to have already once amended prior to the decree), and appealed on January 23, 1897, to the circuit court of appeals (p. 12). Thereafter, on February 1, this court issued its writ of *certiorari*.

This case brings up a question which has been recently much discussed, namely: Whether the words "colony, district, or people," in the section above quoted, include insurrectionary bodies like the present "Republic of Cuba," whose belligerency, technically speaking, has not yet been recognized by the executive department of our Government.

That such bodies are so included was held by Attorney General Hoar in an opinion upon the former Cuban insurrection (13 Op., 177), and up to a recent date this construction has been acquiesced in. (*The Mary N. Hogan*, 18 Fed. Rep., 529; *United States* v. *214 Boxes of Arms*, 20 id., 50; *The City of Mexico*, 28 id., 148.)

This opinion was referred to with approval by this court in the recent case of *Wiborg* v. *United States* (163 U. S., 632, 647). The first decision to the contrary is the one which is now brought here for review; but it is in line with a series of *dicta* commencing with that of Judge Brown in *The Carondelet* (37 Fed. Rep., 799).

Judge Brown's opinion was consistent with his prior opinion in *The Ambrose Light* (25 Fed. Rep., 403), in which he held on the one hand that cruisers of unrecognized insurgents were pirates, and on the other that very slight executive recognition is sufficient to give them the full standing of belligerents. Upon both points he was answered by Dr. Wharton in the Albany Law Journal. (See Appendix J.) We believe that if the later opinion of Judge Brown is correct, the earlier is correct also—that hostilities up are necessarily piratical where they are not within § 5283.

In speaking in this brief of recognition by the executive department of the Government we do not mean to express an opinion upon the question now being mooted, whether or how far such recognition may be made by legislative action also (discussed in Sen. Doc. No. 56, 54th Congr., 2d session.

STATEMENT OF THE CASE.

The libel.—The first two paragraphs allege the seizure and detention of the vessel. The third paragraph alleges that the vessel was, on May 23, 1896—

> Furnished, fitted out, and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain, in the Island of Cuba, to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain, in the Island of Cuba, with whom the United States are and were at that date at peace.

The fourth paragraph is substantially similar, except that it defines the "certain people" as "*the* insurgents in the Island of Cuba, otherwise called *the Cuban revolutionists.*"

The fifth paragraph repeats the allegations of the third, with greater fullness of detail. The sixth and last paragraphs set forth the legal conclusions that the vessel, her tackle, etc., are forfeited to the use of the United States, and that the litigation is within the jurisdiction of the district court for the southern district of Florida.

The Cuban revolutionists.—The allegations of the fourth paragraph identify the "certain people" referred to in the libel, so that their full description may be had from documents of which courts take judicial notice, namely, messages and proclamations of the President of the United States. Two proclamations referring to these "revolutionists" are printed as Appendices K and L, and extracts from the last two annual messages of the President are to be found as Appendices M and N. It will thus appear that the "revolutionists" have received what is sometimes called a *recognition of insurgency*, but have not received what is technically known as a *recognition of belligerency*.

Exceptions.—The first and fourth exceptions were overruled by the court. The second, third, fifth, and sixth exceptions raise in different forms the point that the vessel was not alleged to have been employed, within the meaning of § 5283, in the service of a foreign prince, state, colony, district, or people "with whom the United States are at peace," or "any body politic recognized by or known to the United States as a body politic."

Stipulations for the release of vessel.—An application was made by the claimants, Napoleon B. Broward and Montcalm Broward, for an appraisement of the vessel, with a view to her release upon stipulation. This application was resisted by the district attorney on the ground that there was no authority to release. It was granted by the court, whose opinion upon this point is to be found

at pp. 8, 9. The vessel was appraised at $4,000, and a bond or stipulation given for $10,000, upon which she was directed to be released (pp. 9, 10).

SPECIFICATION OF ERRORS.

The following errors are assigned:

First. For that the court over the objection of the libelants allowed the said steam vessel *Three Friends* to be released from custody upon the giving of bond.

Second. For that the court erred in sustaining the second, third, fifth, and sixth exceptions of the claimants to the libel of information of the libelants.

Third. For that the court erred in entering a decree dismissing the libel of information herein.

ARGUMENT.

Judge Locke dismissed the libel on the ground that in his opinion our statutes require a "recognition of belligerency" of the insurrectionists before they can be regarded as a "colony, district, or people" within the statutory meaning.

We shall argue, first, that the internal evidence of the statutes does not support Judge Locke's position, but is opposed to it; second, that the history of the statutes does not support his position, but is opposed to it; third, that if any "recognition" by the Executive of the United States is necessary to set the statute in motion sufficient recognition has already been given. If these points are well taken, it follows that the decree should be reversed. And we shall argue, fourth, that this court, in its judgment

of reversal, should direct that the boat be restored to the custody of the officers, her release upon stipulation having been unauthorized.

The libel is based on the word "people," and this is believed to be the correct position.

If, however, the word "colony" or "district" is the more accurate definition of the Cuban insurrectionary body, the libel is still sufficient, for it describes the insurrection sufficiently to enable the court to perceive what is meant through its judicial knowledge, derived from the President's proclamations and messages. The variance would be merely in the statement of a legal conclusion, and the liberal rules of admiralty pleading would sustain the libel. (*The Palmyra*, 12 Wheat., 1, 12–13; *The Gazelle*, 128 U. S., 474, 487; see *The Caroline*, 7 Cranch, 496, 500; *The Edward*, 1 Wheat., 261; *The Emily and Caroline*, 9 Wheat., 381, 386; *The Watchful*, 6 Wall., 91; Benedict's Admiralty, § 483.)

I.

The internal evidence of the statute is opposed to the theory that a recognition of belligerency is essential to its operation.

What is a recognition of belligerency?

This is a matter which does not always seem to be understood clearly. It is supposed by some that the existence of hostilities in a foreign country can not be made publicly known by the Executive of the United States without recognizing all rights of belligerency in

the parties to such hostilities; and that a recognition of belligerency does not to any extent recognize the belligerent parties as princes or states, if they were not such prior to the recognition, but constitutes them colonies, districts, or peoples, although they were not such before.

On the contrary the following propositions seem to be clearly established:

(1) That a recognition of belligerency is not always accomplished by a recognition of the fact that actual hostilities are in progress.

(2) That the existence of a civil war, in the ordinary sense of that term, may be made known by what is sometimes called a recognition of insurgency.

(3) That to justify a recognition of belligerency there must be something more than the mere existence of a civil war—the nation which gives the recognition must be impelled to do so for the protection of its own rights or those of its citizens.

(4) That the recognition of an insurgent body as a belligerent, in the technical sense of the phrase, makes that insurgent body a state for all purposes of the war.

The latest authoritative work on international law is that of Professor Lawrence, published in 1895, and quoted by the court in the Wiborg case. Upon the effect of a "recognition of belligerency," this writer says (Lawrence, Principles of International Law, §162):

> It does not confer upon the community recognized all the rights of an independent state, but it grants to its government and subjects the rights and imposes upon them the obligations of an independent state in all matters relating to the war.

The same writer discusses the proper prerequisites to such a recognition as follows (§163):

> Two conditions are necessary. The struggle must have attained the dimensions of a war as wars are understood by civilized states, and the interests of the power which recognizes must be affected by it. * * * The second condition is satisfied when there are so many points of contact between the subjects of the recognizing state and the warlike operations that it is necessary for it to determine how it will treat the parties to the struggle. When an insurrection is confined to a district in the interior of a country, other states would be acting in an unfriendly manner if they recognized the belligerency of the insurgents, because by the nature of the case the incidents of the conflict could not directly affect their subjects. But if a frontier province rebelled, it would be difficult for the neighboring power or powers not to determine whether or no the rebellion amounted to a war, and should the struggle be maritime, states interested in sea-borne commerce could hardly refrain from recognition if the area of hostilities was wide and the interests at stake great and various.

A familiar and clear, although less terse, statement of these propositions, with references to authorities, is to be found in Dana's Wheaton on International Law, § 23, note, quoted in part in Snow's Cases on International Law, p. 24.

Mr. Hall says that a recognition of belligerency has the effect "to give the belligerent community rights and duties identical with those attaching to a state for the purposes of its warlike operations as between it and the country recognizing its belligerent character" (Hall's

International Law, 4th ed., p. 32), and he takes the view above stated of the circumstances under which belligerency may properly be recognized (pp. 35–7).

Dr. Wharton in his International Law Digest collects a number of precedents (1 Wharton Int. Law Dig., 2d ed., pp. 509–520). While they show that the existence of belligerency is primarily a question of fact, they show also that its recognition by a nation not involved in the contest depends largely upon questions of policy. For instance, Secretary Fish held that it might be determined by "the nearness of the seat of hostilities to the neutral" (p. 514); and President Woolsey says that "provinces in revolt are not entitled by the law of nations to *rights* as equal parties to a civil war. They have properly no rights, and the concession of belligerency is not made on their account, but on account of considerations of policy on the part of the state itself which declares them such, or on the grounds of humanity" (pp. 515–16).

From a study of international law it thus becomes clear that in a statute passed for the purposes of maintaining neutrality the word "state" sufficiently covers the case of a belligerent, whether or not its independence has been recognized. Insurrectionists endeavoring to separate themselves from the mother country become a state for the purposes of the war when their belligerency is recognized. When their independence is recognized they become a state for all purposes.

It is further apparent that there may be a recognition of the fact of actual warfare without a recognition of belligerency in the technical sense. This is a corollary

to the proposition that in order to justify a recognition of belligerency the fact that actual warfare is in progress is not of itself sufficient.

The consequences of a recognition of the belligerency of an insurgent body—while it neither increases nor diminishes the duty of non-interference—are very serious. The neutral nation must abandon further claims for reparation on account of damages suffered by its citizens through the hostilities. Its merchantmen must submit to the rights of blockade, visitation, search, and seizure of contraband articles on the high seas.

Hence a recognition of belligerency should never be given except when it becomes necessary on the grounds above stated, or in the rare instances when armed intervention is justifiable.

Such a recognition can often be forced by either party to the warfare by establishing an effective blockade.

It is forced by an insurgent body when it enters into maritime operations and maintains the right to search neutral vessels for contraband of war. The neutral is thus forced either to recognize the vessels of the insurgents as belligerents or to pursue them as pirates, for if they molest third parties they must be one or the other, whatever the true definition of piracy may be. (See *The Malek Adhel*, 2 How., 210; *The Ambrose Light*, 25 Fed. Rep., 408, and authorities cited; Dr. Wharton's criticism thereon in 33 Alb. L. J., 125, and authorities cited; Lawrence, International Law, § 122; Dana's Wheaton, § 124, note; 1 Op., 249, 252.)

When insurgents have no maritime force, and the war is not in contiguous territory, a recognition of belligerency harms them as well as the neutral; for it gives to their enemy rights of search on the high seas which they themselves are unable to utilize. Thus if we should be forced to recognize the present hostilities in Cuba as a civil war, technically speaking, the shipment of arms, ammunition and other contraband goods to the insurgents would become much more difficult.

Hence recognitions of belligerency by a neutral nation are comparatively rare. Recognitions of the fact that hostilities are in progress are, however, quite common. Those which have been given to the present Cuban insurrection by President Cleveland (Appendices K, L, M, and N) are but the most recent and famous instances. To such recognitions Dr. Wharton has applied the convenient phrase "recognition of insurgency." (3 Whart. Int. Law Dig., 2d ed., 351; Criticism of Ambrose Light Case, 33 Alb. L. J., 125; see Appendix J.)

In discussing the present so-called neutrality law (Rev. St., Title LXVII), it is to be remembered that it is based on the former codification of April 20, 1818, c. 88, which in turn was derived from the so-called neutrality act of June 5, 1794, c. 50, as supplemented by the act of March 3, 1817, c. 58. The act of 1794 in its various provisions contained only the words "prince or state." The act of 1817, wherever those words were used, added the words "colony, district, or people" (with one apparently accidental exception). The act of 1818 inserted the latter words at every place where the words "prince or state" were found in either of the prior acts.

It is apparent upon examination of the Revised Statutes, whether considered by themselves or in comparison with the acts of 1794, 1817, and 1818, that they show rather an intent to include than an intent to exclude insurrections in their earlier stages.

(1) *The heading "Neutrality."*—This heading is inserted merely for convenience, and is not to be found in the act of 1794 or that of 1818. That it does not limit the operation of the act is settled by *Wiborg* v. *United States* (163 U. S., 632, 647).

(2) *The existence of a recognized state of belligerency is not an express requirement of the statute.*—§ 5283 does not even use the word "war." In this respect it differs from § 5281. If it was intended to make the operation of the statute dependent upon the existence of a state of recognized belligerency in the technical sense of the term, the absence of apt words to that end can not be accounted for.

If §5283 were intended to apply only to hostilities officially recognized, it would not contain the words "the subjects, citizens, or property of." War is waged against a state, not against its subjects, citizens, *or* property.

(3) *There could be no object in discriminating between recognized and unrecognized belligerents.*—The duty of the United States not to interfere between the contending parties in a foreign civil war is not altered in any respect by a recognition of belligerency. The evils to be feared

if we fail to perform this duty—pecuniary demands, reprisals, or even actual war—are the same after as before such recognition. Recognition of belligerency involves other perils to our citizens—liability to be stopped and searched on the high seas, and abandonment of claims for injuries to property in the insurrectionary region. Why should Congress be held to have intended to deprive the Government of full power to avert one danger until forced to encounter the other also?

(4) *Had acknowledged belligerency been the test intended the wording of the act of 1794 would have been sufficient.*—It has already been pointed out that an insurrectionary body, when its belligerency is recognized, becomes a state for all purposes of the pending war; and therefore it would naturally follow that the words "prince or state" in the original statute would become applicable to the case. This was the contemporary opinion of the Supreme Court (*The Estrella* and the *Gran Para*, *infra*). That these words were deemed insufficient is presumptive evidence that the statute was intended to apply to parties whose belligerency had not been recognized; and in our next point we shall show that the presumption is confirmed by historical investigation.

(5) *The words "colony," "district," and "people" are not apt if parties recognized as belligerent are the only ones intended to be referred to.*—A belligerent is not recognized as a colony, as a district, or as a people, but as a prince or as a state. Let us consider the words separately.

(*a*) *Colony.*—An insurgent colony is or is not recognized as a belligerent, when a condition of undoubted war exists, according as the hostile operations do or do not come into actual contact with citizens of the United States pursuing their ordinary avocations. Thus the belligerency of the revolted colony of La Plata or Buenos Ayres was recognized during the South American revolution because it was a maritime community whose vessels scoured the seas and even frequented our ports. The belligerency of the revolted colony of Paraguay was never recognized during the continuance of the contest, because that colony was not maritime and we never came in contact with its forces. A recognition of belligerency of that colony would have been unnecessary for our own protection, and would, therefore, have been an affront to Spain. Yet can there be any doubt that enlistment of Paraguayan troops upon our soil would have been as gross a breach of our national obligations as an enlistment of troops for the service of Buenos Ayres? Or that enlistment of troops for Buenos Ayres would have been as objectionable before as after recognition? The word "colony" described Paraguay as well as Buenos Ayres. It described Buenos Ayres before recognition as completely as it did after that occurrence.

(*b*) *District.*—The word "district" is peculiarly inapt if the intent is to describe a body whose belligerency has been recognized.

International law does not authorize the recognition of an insurrectionary body as a belligerent until it has become clothed with all of the attributes of a *de facto*

sovereignty. With reference to such a body the word "district" would not naturally be used. Its more natural use would be in reference to the inchoate stage of disturbance before the insurrection has taken apparent permanent shape. Whether before or after the recognition of belligerency of the insurrectionists, the word "district" would ordinarily be used to describe the territory actually occupied by them rather than their *de facto* government, whose name would represent, not the territory actually held, but the territory covered by its claim of sovereignty. Thus, if the Cuban insurrectionists should be recognized it would be, under their own appellation, as "Cuba;" but we would still speak of the insurrectionary district, meaning the territory which they actually occupy. The recognition of the Confederacy referred to the territory bounded by the lines of the seceding States, but when we spoke of the insurrectionary district we generally referred to a boundary of Confederate bayonets.

(*c*) *People.*—It is true that "a people" is a phrase often used as equivalent to a state. This can not be its use in the present statute, because it was introduced as an amendment to a law which already contained the word "state." The new word is not to be interpreted as mere surplusage, but is to be given some separate force if possible. (*Market Co.* v. *Hoffman*, 101 U. S., 112, 115–16; Opinion of Justices, 22 Pick., 571, 573.) This principle was applied to the British Foreign Enlistment Act in *Attorney-General* v. *Sillem*, 2 Hurlst. & Coltm., 431, 572, quoting Lord Coke in 8 Rep., 117.

Assuming, then, that the word is not used as the equivalent of a state or a nation, it must be used in the alternative sense of a body of men less than a nation who are bound together by ties of blood, neighborship, common enterprise, or otherwise. To this use of the word it is not necessary that there should be a recognition of belligerency or even actual hostilities pending. We spoke of the Cuban people before the revolt. We speak of the Irish people now. The Russian Jews are a people, although scattered all over an empire. If the inhabitants of any cosmopolitan city should unite in revolt they would properly be called a people, however diverse in race and tongue. Any body of individuals claiming the right to be independent, and struggling to achieve their independence, is commonly called a people from the moment when the struggle becomes important enough to attract the attention of the world; and they will not be called by this name any sooner because, by reason of their access to the sea or their contiguity to some other nation, their belligerency may receive foreign recognition at an earlier stage of the insurrection.

(5) *The words "with whom the United States are at peace" are not material to this question.*—The United States are at peace with all mankind except those with whom they are at war. When the United States are at war with any foreign prince, state, colony, district, or people, there is no reason for prohibiting hostile cruisers, whether in our own service or in that of communities which are likewise hostile. If the United States should

declare war against Spain we would remain at peace with the Cuban insurrectionists. We can not now cruise against either party to the hostilities in Cuba. We could then cruise against Spain, but not against the insurrectionists. The statutory requirement as to peace has no other meaning than this.

(6) *The authorities.*—Recent cases in the lower courts up to the present have all turned upon other points. Their *dicta* are catalogued by Judge Locke in his opinion. Those in *United States* v. *Quincy*, 6 Pet., 445, had no relation to the question now under consideration. Chief Justice Marshall and his contemporaries, as will be shown, considered that belligerent states, whether independent or not, fell within the word "state" in the older statute, and that the statute in its present form includes more. There is, however, no decision precisely in point.

(7) *Conclusion.*—There being nothing in the statute to indicate that the intention was to make belligerency a test or condition, we can not import it arbitrarily by way of narrowing a penal statute. The neutrality act is a remedial law, to be construed reasonably. (*Wiborg* v. *United States*, 163 U. S., 632, 650.)

An investigation, however, into the history of the statutes of 1817 and 1818, and into their contemporary construction, makes it very clear that a recognition of belligerency was not intended or supposed by the legislators to be a prerequisite to the operation of those laws.

II.

The history of the statute is opposed to the idea that a recognition of belligerency is essential to its operation.

The theory of Judge Locke is that the words "colony, district, or people" were inserted in 1818 with reference to certain Spanish-American colonies whose belligerency had been recognized, and in order to avoid the effect of *Gelston* v. *Hoyt*, which he supposes to have involved the proceedings of recognized belligerents.

These words were, in fact, inserted in 1817, when the belligerency of no Spanish-American colony had received formal recognition. They had reference also to insurgent districts or peoples whose belligerency was never at any time recognized, formally or informally. *Gelston* v. *Hoyt* did not involve the proceedings of recognized belligerents.

The so-called neutrality acts of 1817 and 1818 and the so-called piracy act of 1819 are annexed to this brief as Appendices A, B, and C, respectively. The latter was evidently intended to supplement the prior legislation, so that remedies should be afforded against all the different forms of private military and naval enterprise to which the disturbances of that period gave rise. Whatever naval hostilities were not piratical in character were evidently regarded as within the prior act.

We shall set forth, first, the situation at the time of the act of 1817; second, the law as then settled; third, the history of that act; fourth, the subsequent legislation of that period; fifth, the contemporary construction; and sixth, the subsequent legislation throwing light upon the subject.

(1) *The situation at the time of the act of 1817.*—The Latin-American world was nearly all at war, but the contesting bodies were divided into various classes, as follows:

(*a*) *The leading Spanish-American colonies, whose position as belligerents was in doubt.*—Whether or not the belligerency of the South American revolutionists had been recognized in Madison's Administration depends upon the question, how much formality is necessary in a recognition of belligerency. Is it only recognized by the President or Secretary of State in a formal document declaring the fact to the world or communicating it to Congress? Or is it recognized also whenever the President or one of the Cabinet officers, in an ordinary official letter of instruction, or in transmitting information to a Congressional committee, uses the term "belligerent" or "civil war?" This can not be. Were it so, then on the same principle President Monroe would have been held to acknowledge the *independence* of the South American Governments as early as January, 1819 (4 Wheat., App'x, p. 41).

The former method was held necessary by Judge Benedict in one of the opinions relied upon by appellees (*The Conserva*, 38 Fed. Rep., 431, 437):

> It is true that various documents issued from the Department of State have been put in evidence, containing certain expressions which the court is invited to examine in order to find therein an implied recognition of the faction of Legitime as representing the Government of Hayti. I do not think that in a case like this the court is required to deal with uncertain

> implications contained in such documents as have been here presented. The fact of public recognition of any prince, state, colony, district, or people as a belligerent is one to be made known to all men by public proclamation from the Executive or some public act by necessary implication equivalent to such a proclamation.

The same view was maintained by Henry Clay in the debates upon the act of 1818 (Annals of Congress, March 18, 1818, p. 1415):

> But was there not, he asked, a considerable alteration since the act of 1817 in our posture in respect to the war between Spain and the provinces. The Executive had since declared to the whole world that the condition of the United States is one of neutrality in regard to the contest. Not that only, but that the war carrying on is a civil war, and that we owe to both parties all the obligations of neutrality—the obligations due to a party in a civil war being very different from those due to a people in rebellion, and demanding, therefore, a different state of our laws.

President Monroe took the contrary view in his message of December 2, 1817, and used language which not only amounted to a present recognition of the colonies as belligerents, but imported that they had been so recognized at "every stage of the conflict" (Appendix H). Judge Brown, of New York, has taken a similar position in *The Ambrose Light*, 25 Fed. Rep., at pp. 443–7, but has been ably answered by Dr. Wharton in the Albany Law Journal (Appendix J).

It must be remembered that the legislators of 1816–17, who passed the act under consideration, had not the benefit of Monroe's message, and their meaning must be

construed in view of the information then available. President Madison had most carefully abstained from any language which would import a formal recognition of belligerency. Thus, in his message of December 26, 1816, he had referred to the inefficacy of existing laws "to prevent violations of the obligations of the United States as a nation at peace toward belligerent parties *and other unlawful acts* on the high seas by armed vessels equipped within the waters of the United States," and to the respect due "to the neutral *and pacific* relations of the United States." (Appendix F.) Monroe's letter of January 19, 1816, to Onis (Appendix E) was a mere personal communication; and Dallas' instructions of July 3, 1815, therein referred to (Appendix D), had not been published, at least not officially. Monroe's letter of January 10, 1817, to Forsyth (Appendix G) was only an informal communication for the benefit of a Congressional committee, and, like the two papers last referred to, was not of a sufficiently formal character to work so great a change in the nation's interests and those of our citizens as is effected by a recognition of belligerent rights, technically speaking.

Yet these are all of the papers which have been considered as working that result during Madison's Administration. Mr. Wheaton, in the appendix to the fourth volume of his reports, placed the earliest recognition at November 17, 1818 (p. 23).

There was afterwards some discussion in Congress as to whether the Treasury order of 1815 admitting insurgent flags to our ports amounted to a recognition of belligerency. Mr. Clay held that it did not (Annals of Con-

gress, March 18, 1818, p. 1415). Mr. Smith pointed out that the flag of St. Domingo (Hayti) was admitted (p. 1427); but it was never claimed that the emperors, kings, and presidents of that island were in any way formally recognized. Mr. Lowndes, differing with Mr. Clay, "denied that the Executive had the power, either by the Constitution or by law, to exclude any flag from our ports—that power was vested in Congress alone" (March 19, 1818, p. 1433). The Treasury order recognized no belligerent because it specified none. It gave no list of flags which were to be admitted; nor did it even specify that the flag should be identified as that of any particular revolutionary body. Apparently the green and yellow petticoat which Mr. Midshipman Easy floated over his prize vessel, according to Capt. Marryat, would have come within its provisions.

It may be urged that this court subsequently, in various opinions, stated that the belligerency of the Spanish-American colonies had been recognized throughout the war, and that some of these opinions were rendered upon controversies which arose prior to Monroe's message of December 2, 1817. This is true, and the court doubtless relied for the statement upon that or some subsequent message. It was not in any case material to the decision, for, after belligerency was once recognized, the cruisers of the belligerent state were entitled to immunity from the charge of piracy, irrespective of the date of their naval operations. If an insurrection begins in October and an insurrectionary cruiser is captured in November, a recognition of belligerency in December justifies all acts of the cruiser which were in a true sense belligerent. A

recognition of belligerency does not even profess to be given upon the day when belligerency commences. It is the recognition of a past as well as a present fact. In those early days of slow intelligence it might not seldom be given after the war was really over, just as, two years earlier, the battle of New Orleans was fought after peace had been made. These court opinions, like the message upon which they were based, were unknown to the legislators of 1816–17.

It may safely be affirmed that Congress did not, in enacting the law of 1817, have the distinction between mere insurgency and belligerency in mind; for if so, it would have perceived that the new act would probably not be applicable even to the Republic of Buenos Ayres, which was then the most prominent and best established of all the insurgents.

The states whose belligerency was recognized by Monroe in 1817 were doubtless those whose independence was recognized in 1822, namely, New Granada and Venezuela (afterwards united as Colombia), Buenos Ayres (officially known as the United Provinces of South America), and Chile—the successful revolts of Peru and Mexico having been later than 1817. That the recognition of belligerency did not apply to all the minor insurgencies has been expressly ruled by this court in *The Nueva Anna and Liebre* (6 Wheat., 193).

(*b*) *Certain Spanish or Portuguese districts whose belligerency had not then been and never was recognized.*—One of these—Paraguay—has been already referred to. This may have attracted no attention, as our people did not

come into contact with it, though probably informed of its existence (4 Am. State Papers, Foreign Relations, pp. 219, 222, 225, 250, 265, 278, 339).

Second only to Buenos Ayres, however, if not first of all the powers of Latin America in capacity to make trouble, was the now forgotten but then world-famous General Artigas, who held sway with various ebbs and flows of fortune on the east bank of the La Plata River in the old Spanish intendency of Banda Oriental, called by him the Oriental Republic, and now known as the independent Republic of Uruguay. Any recognition of his claims would have given offense, not only to Spain, but to Portugal, and even to Buenos Ayres, for all three laid claim to his territory, and with all three he was at war. His main city, Montevideo, was generally in Portuguese control. Yet cruisers under the "Artigan flag," and claiming to be commissioned by Artigas, were on all the seas. They did the main injury complained of by the Portuguese Government. (H. R. Ex. Doc. No. 53, 32d Cong., 1st sess., pp. 193–200; see also *The Gran Para*, 7 Wheat., 471.) Notices of his proceedings are to be found in 4 American State Papers, Foreign Relations, at pp. 173–4, 218, 219, 221, 225, 250, 268, 274, 288, 289, and in argument of counsel, 7 Wheat., pp. 476–481. His country had been claimed by both Spain and Portugal. Portugal had surrendered it in 1778, but renewed the claim when the South American revolutions broke out. It was the Portuguese who finally conquered Artigas, and the country was then for a time annexed to Brazil. In 1817 and 1818 the Artigas revolt seems generally to have been regarded as directed against Portugal rather than against

Spain, but Monroe's recognition of belligerency in December, 1817, applied only to "the contest between Spain and the colonies."

This was pointed out by Attorney General Wirt in his letter of November 6, 1818, to the district attorney at Baltimore (1 Op., 249; Appendix I hereto). He says that Monroe's message is "not pointed at Artigas," and that the recognition of civil war in Buenos Ayres does not recognize him as a belligerent. Mr. Wirt spoke as a member of Monroe's Cabinet, and his utterance can not be controverted.

As late as 1822, after Artigas had been conquered by the Portuguese, his nonrecognition as a belligerent was still familiarly used to illustrate arguments (7 Wheat, at p. 509).

(*c*) *Hayti.*—This unfortunate island had long been free from the sovereignty of France, but its independence had not been recognized by us, and was not so recognized prior to 1862, because it was under negro domination. At that time it was divided between two negro chieftains who were engaged in a bloody contest, but whose belligerency had not been recognized. As stated by Attorney General Wirt (*ut sup.*), "our Government had never acknowledged those sovereignties, not even by the recognition of a civil war between themselves or their mother countries." Henry Clay said that "we had not recognized the war as a civil war, etc., or in any manner so regarded it as that a case arising under it in our courts could be viewed in the same light as a case occurring in the existing conflict in South America." (Annals of Congress, March 18, 1818, p. 1425.)

(*d*) *Amelia Island and Galveston.*—These places were the rendezvous of privateers (Aury their best-known leader), claiming the right to fly the Venezuelan, Artigan, and other revolutionary flags. (1 Whart. Int. Law Dig., § 50*a*.) They were practically pirates, as stated by Monroe (Appendix H).

(2) *The law as settled and understood at the time of the act of 1817.*—The act of 1794, in its corresponding provision, applied only to cruises and hostilities in the service of a foreign "prince or state." These words had been construed in one case only, that of *Hoyt* v. *Gelston*, afterwards known as *Gelston* v. *Hoyt* (13 Johns, 141, 561), decided in the courts of the State of New York in 1816, then pending in this court on writ of error, but as yet unargued.

It was an action of trespass against the collector and surveyor of the port of New York for seizing the ship *American Eagle*, her tackle, apparel, etc. The seizure was made July 10, 1810, by orders of President Madison, under that provision of the act of 1794 which corresponds to our present § 5283. The ship was intended for the service of Pétion against Christophe in the Island of Hayti. As above stated, neither of these negroes was recognized as independent, *nor even as belligerent*. The former was a president, the latter a king. Counsel argued that their governments were *de facto* sovereignties (pp. 145–146). The courts unanimously held that such a sovereignty could not be recognized as a prince or state by them prior to its recognition by the Government.

Whether a *de facto* or belligerent sovereignty came within the statute after its recognition as a belligerent by

the Executive was a question which could not have arisen in the case, and which had not been discussed; nor was it discussed subsequently upon the arguments in this court, or in the opinions here rendered (3 Wheat., 246).

Had the belligerency of Pétion and Christophe been recognized, there can be little doubt that they would have been held to be within the statute of 1794, for at the following term in *The Estrella* (4 Wheat., 298, 310), in discussing the same statute, the court were of opinion that the belligerent colony of Venezuela was within its terms.

(3) *History of the act of 1817.*—This act was reported by the Foreign Affairs Committee of the House of Representatives. Mr. Samuel Smith, of Maryland, one of the members of that committee, is authority for the statement that it was originally due to a request from the Portuguese minister, Correa. (Annals of Congress, March 18, 1818, p. 1421.) The correspondence with that minister is annexed to a message of January 28, 1852. (H. R. Ex. Doc. No. 53, 32nd Congr., 1st sess.) His communication (pp. 161–3) bears date December 20, 1816, and was called forth by threatened war between Buenos Ayres and Portugal. He does not claim that the act of 1794 is inapplicable to Buenos Ayres, but that its provisions are not sufficiently effective. Mr. Forsyth says that there were similar complaints also from the British and French ministers. (Annals, p. 1409.) Secretary Monroe writes him on December 27 that the President has addressed a message to Congress on the subject (p. 163). This message is the one of December 26, printed as Appendix F. Further correspondence between Secretary

Monroe and Mr. Forsyth, chairman of the committee, is to be found in the Annals of Congress, 1816–17, at pp. 1080–5. Neither this correspondence nor the bill reported by Mr. Forsyth, nor yet the debate upon that bill (pp. 715–767), indicates any idea that the then existing law was inapplicable. The bill did not contain the words "colony, district, or people" until the very moment before it passed to a third reading.

These words were inserted by amendment, in some way not shown by the Journal or the reported debates, on Janury 28, 1817. (Annals, pp. 767–8.) Mr. Tucker, of Virginia, in the following year stated that "there had been in our courts a decision which seemed to indicate the necessity of using some farther designation in order to take in the case of the Spanish colonies." (Annals, March 18, 1818, p. 1420.) He had not been a member of the committee and had not taken part in the votes on the bill, but probably his information was correct so far as it went, and the word "colony" was inserted to avoid doubt in this particular. Buenos Ayres and the other Spanish American States each represented an old viceroyalty or colony. But what was the decision referred to, and why were the words "district or people" added also?

Doubtless the decicion referred to by Mr. Tucker was that of the New York courts in *Gelston* v. *Hoyt*, the writ of error in which case had been issued in or before May, 1816 (13 Johns., 590), and which was then in the hands of Attorney General Rush, who argued it a few weeks later in this court (3 Wheat., 278). Mr. Smith, one of the committee, so supposed. (Annals, March 18,

1818, p. 1423.) We may assume that the Attorney-General called attention to the ambiguity in the existing law, and fitted the proposed law, not only to the case of the revolting colonies whose belligerency had perhaps been recognized, but to that of Pétion and Christophe, who were certainly not recognized belligerents, and probably with an eye also to Artigas, who claimed not a colony but a mere intendency or province, and who was also without recognition.

The very close relations then existing between the Madison Administration and the leaders of the House make this assumption an unusually safe one; and that Mr. Rush probably had the distinction between belligerency and nonbelligerency in mind, as well as the weakness of the Haytian case in this respect, is shown by his arguments at 3 Wheat., 284. That case was curiously similar to *The Carondelet* (37 Fed. Rep., 799.)

The history of the act, therefore, tends to show that it was intended to cover at least the case of every revolutionary body, recognized or unrecognized, which made *bona fide* claim to rights of sovereignty. The only doubt left was over the application of the act to the Galveston and Amelia Island freebooters, and to make the criminal law complete the act of 1819 was passed.

Chief Justice Marshall afterwards said that the act of 1817 "adapts the previous laws to the actual situation of the world." (*The Gran Para*, 7 Wheat., 471, 489.)

If the language of the act was suggested by *Gelston* v. *Hoyt*, the presence of the word "district" is accounted for. The record in that case always described the alleged foreign states as "that part of the island of St. Domingo

which was then under the government of Pétion," and "that part of the island of St. Domingo which was then under the government of Christophe." (3 Wheat., 258, 266, 270, 274, 323.) In Spanish America the word represented the smallest legal subdivision—less than an intendency, province, or bishopric. (4 Am. State Papers, Foreign Relations, pp. 219, 224, 249, 329, 333, 337.)

(4) *Legislation against privateering during Monroe's Administration.*—The only notable change in the situation after the act of 1817 was in President Monroe's definite recognition of the belligerency of the Spanish colonies in December of that year. *Gelston* v. *Hoyt* had been argued and decided in this court, and *United States* v. *Palmer* (3 Wheat., 610) had also been certified and decided, when the act of 1818 came up for debate; but the former decision simply affirmed the rulings of the State courts, while the latter turned on the piracy act of 1790, and did not construe the acts of 1794 and 1817.

The act of 1818 was a codification of the prior legislation, and the debates upon it are relevant only in so far as they have been above quoted as throwing light on the proceedings of the previous year.

The act of 1819 is particularly notable on account of the third section, which is not directed against piracy, but against nonpiratical aggressions, searches, etc., conducted by privateers of belligerent powers. The right of visitation and search by public armed belligerent vessels seeking contraband has never been disputed; and it has always been admitted that this right exists on the part of either belligerent, whether recognized as independent or not. In short, as above shown, recognition

of belligerency is the same as recognition of independence, so far as rights and liabilities relating to the war are concerned.

§ 3 authorizes our merchant vessels to resist all searches, except by "a public armed vessel of some *nation* in amity with the United States." The belligerent is thus clearly (and properly) recognized as a "nation," whether it is treated as independent for all purposes or not. Yet the word "nation" imports independence in no less degree than the words "prince or state;" and the act throws strong light on the contemporary understanding of the scope of these words.

(5) *Contemporary construction.*—That the act of 1794 was understood as covering the case of a State recognized as belligerent only, and hence that the later acts were understood as including something more, is indicated by contemporaneous references, so far as any can be found.

We may refer first to the case of *The Estrella* (4 Wheat., 298), decided at February term, 1819. It arose under a capture by the Venezuelan privateer *Constitution*, on April 24, 1817. There was a recapture by an American vessel, and the prize thus came before the court at New Orleans for adjudication. The privateer was found to have a regular commission from Bolivar, dated in 1816 or earlier; but she had violated the act of 1794, § 2 (which is the same as the corresponding section of 1818, omitting the "colony, district, or people"), by enlisting men at New Orleans, provided Venezuela was a "state" within the meaning of that statute. The court so held (p. 310), thus confirming our view that recognition of belligerency makes the belligerent a "state."

In *La Conception* (6 Wheat., 235, 239) the court refer to Buenos Ayres as a "government."

In *The Nueva Anna and Liebre* (6 Wheat., 193) there was offered in proof the record of a prize court at "Galveztown," under the "Mexican Republic." This court refused to recognize the belligerent right claimed, because our Government had not "acknowledged the existence of any Mexican republic or *state* at war with Spain."

The Gran Para (7 Wheat., 471), was captured in the summer of 1818 by *The Irresistible*, a privateer flying the colors of General Artigas' so-called "Oriental Republic." The case turned on another point, and is chiefly notable from the full discussion of Artigas' position by counsel and because Chief Justice Marshall referred to Buenos Ayres as a state within the meaning of the act of 1794 (p. 488). Another capture by the same notorious privateer was before this court in *La Nereyda* (8 Wheat., 108). She was herself libeled under the neutrality laws in May, 1819, for cruising "in the service of some foreign *district* or *people* to the said attorney unknown," as appears from the record, but the proceeding was dismissed on a technicality. (*The Irresistible*, 7 Wheat., 551.) That this "district or people" referred to the Artigas party is shown by correspondence with the Portuguese minister (H. R. Ex. Doc. No. 53, 32d Congr., 1st session, pp. 169–70, 173–4).

The Monte Allegre (7 Wheat., 520) was a prize cause arising out of the capture of a Portuguese merchantman by an American-owned privateer sailing under the Artigan flag. Chief Justice Marshall said that there could be "no doubt but that the captures made by the *Fortuna*

are in violation of the laws of the United States, enacted for the preservation of our neutrality."

In *The Antelope* (10 Wheat., 66, 125), Chief Justice Marshall said that a cruiser which was outfitted in Baltimore in 1819 and sailed under the "Artigan flag" had "violated the neutrality of the United States;" evidently referring to § 2 of the act of 1818, although that flag did not belong to a recognized belligerent.

It may be added that John Forsyth, who had had charge in the House of Representatives of the acts of 1817 and 1818, was Secretary of State at the time of the revolution in Texas. He evidently then regarded the operation of these acts as in nowise dependent upon a recognition of belligerency. In his circular instruction to district attorneys on November 4, 1835, he says (H. R., 24th Congr., 1st session, Doc. No. 256, p. 36):

> You are therefore earnestly enjoined, *should the contest begin*, to be attentive to all movements of a hostile character which may be contemplated or attempted within your district, and to prosecute without discrimination all violations of those laws of the United States which have been enacted for the purpose of preserving peace and of fulfilling the obligations of treaties with foreign powers.

On February 24, 1836, Secretary Forsyth instructed the district attorney at Nashville to prosecute for the offense of enlisting troops to aid the insurgents. (Id., p. 37.)

On November 13, 1835, Governor White of Louisiana had issued a proclamation calling attention to the statute creating this offense (H. R., 25th Congr., 2d session, Doc. No. 74, p. 10) in pursuance of a letter from Forsyth (p. 3).

The Texan declaration of independence bears date March 2, 1836 (Sen., 24th Congr., 1st session, Doc. No. 415, p. 3).

(6) *Subsequent legislation.*—In 1837 an insurrection broke out in Canada. Belligerency of the insurgents was never recognized. Van Buren, in his annual message of 1838, shows clearly that he regards them in the same light in which the present Cuban insurrectionists have been regarded. A neutrality act was passed, however; and the words "colony, district, or people" were regarded as sufficient for the case. (Act of March 10, 1838, c. 31, §§ 1, 2, 5.) The act expired in two years by its own limitation (§ 9).

In his Albany Law Journal article which is set forth in the appendix to this brief, Dr. Wharton says:

> The *Caroline* was a vessel which was employed in 1840 by Canadian insurgents in an attack on Canada ports. There was not a shadow of a pretense that the forces of whom she was one of the weapons were recognized as belligerents by either Great Britain or the United States.

III.

If any executive recognition is necessary to put the statute in operation, that recognition had been given when the libel was filed.

We have already pointed out that, as shown by Dr. Wharton, there is such a thing known to international law as a recognition of *insurgency* as distinguished from a recognition of *belligerency*. Whether the statute is applicable to insurrections so obscure or recent that they have

never received executive recognition from this Government at all (as in *The City of Mexico*, 28 Fed. Rep., 148, and see also *United States* v. *Quitman*, 27 Fed cas., 680) is a question not involved in the present case, and which we shall not argue; for the amplest recognition of insurgency had already been given before May 23, 1896, when this forfeiture was incurred.

On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that "the Island of Cuba is now the seat of serious civil disturbances, accompanied by armed resistance to the authority of the established Government of Spain," and that the so-called "neutrality act" was applicable to the case. A copy of this proclamation is annexed hereto as Appendix K.

In his message of December 2, 1895, the President informed Congress that the insurrection "now exists in a large part of the eastern interior of the Island," and that assistance thereto on the part of our citizens would be a violation of neutrality (Appendix L).

Since May 23 a further proclamation and message have been promulgated, copies of which are also annexed hereto as Appendices M and N, not as necessary to the case, but in order to give a complete official history of the Cuban insurrection up to date.

If necessary, they would be competent; for, as above shown, the Executive recognition is of a past fact. It does not constitute the condition of insurgency or belligerency, as the case may be, but gives the information necessary to enable the court to take notice of it.

When a vessel belonging to citizens of the United States commits hostilities upon the high seas against a friendly power, her act is *prima facie* piratical. She is forfeit, and her owners, officers, and crew are liable to be hanged. (See *The Ambrose Light*, 25 Fed. Rep., 408, and auth. cit.; Lawrence, International Law, § 122; Dana's Wheaton, § 124, note.) If the act is done in the interests of a colony, district, or people struggling for independence, then it is freed from this imputation, and the punishment is under a different and milder law. How is this fact to be established? It is matter of judicial notice, not proof. It is not in its nature susceptible of proof by witnesses, and, besides, from motives of policy the judiciary looks to the Executive for information. It does not ask whether the Executive has conceded all the rights of war as against a neutral nation. It asks only whether a *bona fide* conflict of arms exists. The Executive informs it of "serious civil disturbances accompanied by armed resistance to the authority of the established Government" which call our neutrality act into play. What more is needed?

As the present insurrection is for independence it is not necessary to inquire whether the pursuit of this object is a prerequisite to the operation of the statute. This does not appear to be required, and the statute seems equally applicable to revolts for the control of an already established state, like the recent Chilean war, or for civil rights, like our Revolution before July 4, 1776, the Buenos Ayres revolution before 1816, and the recent proposed revolt in Johannesburg.

IV.

The bond or stipulation for the release of the vessel is not authorized by law, and she should be ordered back into the custody of the marshal.

Mere matters of practice are not reviewable by this court. Interlocutory decrees and orders are, however, reviewable, when they involve the merits of the case and in effect modify any final decree which may be entered for the complainant. Instances of review of interlocutory proceedings at law and in equity are found in *Buckingham* v. *McLean*, 13 How., 150; *Railroad* v. *Soutter*, 2 Wall., 510, 521; *Removal Cases*, 100 U. S., 457, 475; and *Worden* v. *Searls*, 121 U. S., 14, 26.

The interlocutory order by which a bond of $10,000 was substituted for the vessel as defendant in the case bears directly upon the merits. If allowed to stand, it prevents a full recovery of the value of the vessel, no matter how inadequate the bond may turn out to be. This is well settled and is exemplified by the case of *The Wild Ranger*, 2 New Rep., 402, 403, set forth and approved by this court in *The Haytian Republic*, 154 U. S., 118, 127 (see also *The Oregon* 158 U. S., 186, 211).

That such an order is reviewable in the appellate court, when it is not discretionary, is clearly implied in *The Wanata*, 95 U. S., 600, 611, and seems to be recognized in *United States* v. *Ames*, 99 U. S., 35, 39–42. A similar interlocutory question was considered on the merits in *The City of Norwich*, 118 U. S., 468, and four justices were for reversal.

(1) *The district judge had no authority to release the vessel by any form of procedure.*—The Revised Statutes very clearly contemplate that seizures for breach of the neutrality laws shall not be subject to a release upon bond or stipulation.

§ 941 provides for such releases in proceedings in general as follows:

> When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, *except the cases of seizure for forfeiture under any law of the United States*, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge [etc.].

The case of seizures for forfeiture to the United States are provided for by § 938, as follows:

> Upon the prayer of any claimant to the court that any vessel, goods, wares, or merchandise seized and prosecuted under any law *respecting the revenue* from imports or tonnage, *or the registering and recording, or the enrolling and licensing of vessels* or any part thereof should be delivered to him, the court shall appoint *three* proper persons to appraise such property, who shall be sworn in open court or before a commissioner appointed [etc.]. * * * If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States [etc.], * * * the court shall, by rule, order such vessel, goods, wares, or merchandise to be delivered to such claimant. * * *

The power of this court to prescribe rules of practice is to be exercised "in any manner not inconsistent with any law of the United States" (§ 917). As the laws above quoted are clearly intended to provide for all cases of seizure for forfeiture to the United States in which bail is to be allowed at all, it is respectfully submitted that rule 11 of this court, under which Judge Locke proceeded, is not to be construed as applicable to a prosecution for forfeiture under the neutrality act.

The learned judge bases his contrary decision very largely upon the decision of Mr. Justice Story and Judge Davis in *The Alligator*, 1 Gall., 145. In that case the court refer to an invariable practice in all proper cases of seizure to take bonds for the property whenever application has been made by the claimant for the purpose (p. 148). This practice is ascribed to the general admiralty procedure, statutory authority being regarded as unnecessary. The point was not necessary to the decision of the motion then before the court, as the claimant had been allowed to give bond without objection, and was attempting to avoid payment thereunder by alleging its irregularity, so that he was affected with an estoppel. The opinion of the same judges in *The Struggle*, 1 Gall., 476, was given under similar circumstances. The latter opinion bears evidence that some doubts respecting the validity of the procedure had crept into the minds of the judges, and they put their decision solely on the ground "that where the claimant voluntarily accepts a delivery on bail, it is an estoppel of his right to contest the validity of the security."

The practice thus referred to was afterwards made statutory by the act of March 3, 1847, c. 55, which contained no exception. In the revision, however, it appears with the exception above quoted (§ 941), and the present Federal legislation on the subject, which is contained in the paragraphs of the Revised Statutes above quoted, presents the question in an entirely different light from that in which it appeared to Mr. Justice Story and Judge Davis.

The remarks of this court in *United States* v. *Ames*, 99 U. S., 35, 39–40, were confined to revenue cases.

It is certainly extraordinary that a boat seized for a crime so dangerous to the peace of the United States as the commission of hostilities against a friendly state should before hearing be unconditionally released upon a bond for $10,000, and set at liberty to renew her unlawful depredations.

The statute (§ 938) seems carefully worded to avoid a release upon bail under such grave charges. If the boat is held without probable cause, her owners can recover demurrage.

There is no real hardship, as supposed by the learned judge, in holding the boat under custody of the United States marshal pending suit. Vessels libeled for forfeiture to the United States, when circumstances do not permit an immediate hearing upon the merits, are not detained entirely from lawful occupations. It may be proper to state that vessels thus detained during the present Cuban insurrection have been allowed by authority of the Attorney General to pursue their ordinary

peaceful avocations under supervision of a deputy marshal placed on board, and that no reasonable request for such permission has been refused, except after such flagrant contempts and frauds upon the United States as cut the owners off from any right to consideration save of strict legal right.

(2) *Even if it were proper to release the vessel under any circumstances, no case for such release was here presented.*—§ 938 above quoted provides that in case of seizures for violation of the revenue or navigation laws, the court shall appoint *three* appraisers. Is it proper, for the violation of laws so much more serious in nature, to allow her to be appraised by two only?

Moreover, the application was, in any view of the law, not based upon absolute right, but addressed to the sound discretion of the court. (*The Struggle*, 1 Gall., 476; *The Mary N. Hogan*, 17 Fed. Rep., 813.) A release in such a case as this should not be given in the absence of a defense upon the merits, and without any affidavit of merits, especially when the petition for release, by alleging that the vessel had been engaged by its owners "exclusively in their legitimate business of towing and wrecking" from October 15 to November 7, 1896, had given good cause to suspect that she was engaged in some illegitimate business at the time of the offense charged.

Under such circumstances it is submitted that no relief should have been given until the petitioners not only deposed to their good faith, but stood cross-examination

thereon. Yet the learned district judge seems to have regarded the district attorney as still under obligation to show *prima facie* that the vessel would be used for further violations of law if allowed to go free, before the owners could be asked to show their good faith. In a subsequent proceeding for forfeiture of the *Three Friends*, the same learned judge has imposed the condition that a Government officer remain on board.

It is respectfully submitted that his unconditional order in the present case went beyond the limits of judicial discretion, even if he had any discretionary power to release the vessel.

It is therefore respectfully submitted that the decree should be reversed and the case remanded to the district court with directions to resume custody of the vessel and proceed to the merits.

JUDSON HARMON,
Attorney-General.
EDWARD B. WHITNEY,
Assistant Attorney-General.

APPENDIX.

A.

[Act of 1817, c. 58.]

AN ACT more effectually to preserve the neutral relations of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any such ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people to cruise or commit hostilities, or to aid or cooperate in any warlike measure whatever, against the subjects, citizens, or property of any prince or state, or of any colony, district, or people with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than ten thousand dollars, and the term of imprisonment shall not exceed ten years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited, one-half to the use of any person who shall give information and the other half to the use of the United States.

§ 2. *And be it further enacted*, That the owners of all armed ships sailing out of the ports of the United States and owned wholly, or in part, by citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners in cruising or committing hostilities, or in aiding, or cooperating, in any warlike measure against the subjects, citizens, or property of any prince or state, or of any colony, district, or people, with whom the United States are at peace.

§ 3. *And be it further enacted*, That the collectors of the customs be, and they are hereby, respectively, authorized and required to detain any vessel manifestly built for warlike purposes, and about to depart from the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners to cruise or commit hostilities upon the subjects, citizens, or property of any prince or state, or of any colony, district, or people, with whom the United States are at peace, until the decision of the President be had thereupon, or until the owner enters into bond and sureties to the United States, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by the owner or owners in cruising or committing hostilities, or in aiding or cooperating in any warlike measure against the subjects, citizens, or property of any prince or state, or of any colony, district, or people, with whom the United States are at peace.

§ 4. *And be it further enacted*, That if any person shall, within the territory or jurisdiction of the United States,

increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, cruiser, or armed vessel in the service of a foreign prince or state, or any colony, district, or people, or belonging to the subjects or citizens of any such prince, state, colony, district, or people, the same being at war with any foreign prince or state with whom the United States are at peace, by adding to the number or size of the guns of such vessels prepared for use, or by the addition thereto of any equipment solely applicable to war, every such person so offending shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be fined and imprisoned, at the discretion of the court in which the conviction shall be had, so as that such fines shall not exceed one thousand dollars, nor the term of imprisonment more than one year.

§ 5. *And be it further enacted*, That this act shall continue in force for the term of two years.

Approved, March 3, 1817.

B.

[Act of 1818, c. 88.]

AN ACT in addition to the "Act for the punishment of certain crimes against the United States," and to repeal the acts therein mentioned.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, the person so offending shall

be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years. [See act of 1794, § 1; Rev. St., § 5281.]

§ 2. *And be it further enacted*, That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars and be imprisoned not exceeding three years: *Provided*, That this act shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who shall transiently be within the United States, and shall on board of any vessel of war, letter of marque, or privateer which at the time of its arrival within the United States was fitted and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States, to enlist or enter himself, to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the the United States shall then be at peace with such foreign prince, state, colony, district, or people. [See act of 1794, § 2; Rev. St., § 5282.]

§ 3. *And be it further enacted*, That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony,

district, or people to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer and the other half to the use of the United States. [See act of 1794, § 3; act of 1817, § 1; Rev. St., § 5283.]

§4. *And be it further enacted*, That if any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming, any private ship or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruise, or commit hostilities, upon the citizens of the United States, or their property, or shall take the command of, or enter on board of any such ship or vessel, for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such person, so offending, shall be deemed guilty of a high misdemeanor, and fined not more than ten thousand dollars, and imprisoned not more than ten years; and the trial for such offense, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought. [See Rev. St., § 5284.]

§ 5. *And be it further enacted*, That if any persons shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war, every person so offending shall be deemed guilty of a high misdemeanor, shall be fined not more than one thousand dollars and be imprisoned not more than one year. [See act of 1794, § 4; act of 1817, § 4; Rev. St., § 5285.]

§ 6. *And be it further enacted*, That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years. [See act of 1794, § 5; Rev. St., § 5286.]

§ 7. *And be it further enacted*, That the district courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof. [See act of 1794, § 6; Rev. St., § 5287.]

§ 8. *And be it further enacted*, That in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot contrary to the provisions and prohibitions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined, and in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, in every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring of the prize or prizes in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise from the Territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace. [See act of 1794, § 7; Rev. St., § 5287.]

§ 9. *And be it further enacted*, That it shall be lawful for the President of the United States, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any

foreign ship or vessel to depart from the United States in all cases in which, by the laws of nations or the treaties of the United States, they ought not to remain within the United States. [See act of 1794, § 8; Rev. St., § 5288.]

§ 10. *And be it further enacted*, That the owners or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace. [See act of 1817, § 2; Rev. St., § 5289.]

§ 11. *And be it further enacted*, That the collectors of the customs be, and they are hereby, respectively authorized and required to detain any vessel manifestly built for warlike purposes, and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners to cruise or commit hostilities upon the subjects, citizens, or property, of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this act. [See act of 1817, § 3; Rev. St., § 5290.]

§ 12. *And be it further enacted*, That the act passed on the fifth day of June, 1794, entitled "An act in addition

to the act for the punishment of certain crimes against the United States," continued in force for a limited time by the act of the second of March, 1797, and perpetuated by the act passed on the 24th of April, 1800, and the act, passed on the 14th day of June, 1797, entitled "An act to prevent citizens of the United States from privateering against nations in amity with, or against the citizens of, the United States," and the act passed the third day of March, 1817, entitled "An act more effectually to preserve the neutral relations of the United States," be, and the same are hereby, severally, repealed: *Provided, nevertheless*, That persons having heretofore offended against any of the acts aforesaid, may be prosecuted, convicted, and punished as if the same were not repealed, and no forfeiture heretofore incurred by a violation of any of the acts aforesaid shall be affected by such repeal.

§ 13. *And be it further enacted*, That nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason or any piracy defined by the laws of the United States. [See act of 1794, § 9; Rev. St., § 5291.]

Approved, April 20, 1818.

C.

[Act of 1819, c. 77.]

AN ACT to protect the commerce of the United States and punish the crime of piracy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and hereby is, authorized and requested to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations. [See Rev. St., § 4293.]

§ 2. *And be it further enacted*, That the President of the United States be, and hereby is, authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States any armed vessel or boat, or any vessel or boat the crew whereof shall be armed and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas. [See Rev. St., § 4294.]

§ 3. *And be it further enacted*, That the commander and crew of any merchant vessel of the United States, owned wholly or in part by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States; and may subdue and capture the same; and may also retake any vessel owned as aforesaid which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States. [See Rev. St., § 4295.]

§ 4. *And be it further enacted*, That whenever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion. [See Rev. St., § 4296.]

§ 5. *And be it further enacted*, That if any person or persons whatsoever shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death. [See Rev. St., § 5368.]

§ 6. *And be it further enacted*, That this act shall be in force until the end of the next session of Congress.

Approved, March 3, 1819.

Made perpetual by act of January 30, 1823, c. 7.

D.

[Dallas' Instructions to Collectors, 1815.]

TREASURY DEPARTMENT,
3rd July, 1815.

P. L. B. DUPLESSIS, Esq.,
Collector, New Orleans.

SIR: Your letter of the 29th May has been submitted to the consideration of the President.

It does not appear that such general instructions as you mentioned have issued from this Department, relative to the entry of vessels belonging to the provinces of Spain; but it is the President's desire that the intercourse with those provinces which are in a state of revolt should strictly conform to the duties of the Government under the law of nations, the acts of Congress, and the treaties with foreign powers.

1. There is no principle of the law of nations which requires us to exclude from our ports the subjects of a foreign power in a state of insurrection against their own Government. It is not incumbent upon us to take notice

of crimes and offences which are committed against the municipal laws of another country, whether they are classed in the highest grade of treason or in the lowest grade of misdemeanor. Piracy is an offence against the law of nations, and every civilized Government undertakes to punish the pirate when brought within its jurisdiction, but an act of revolt or rebellion against a sovereign must not be confounded with an act of piracy, which is denominated hostility against the human race.

Any merchant vessel, therefore, which has not committed an offence against the law of nations, being freighted with a lawful cargo and conforming in all respects to the laws of the United States, is entitled to an entry at our custom-houses whatever flag she may bear. She is also entitled to take on board a return cargo and to depart from the United States with the usual clearance.

2. But while a public war exists between two foreign nations, or when a civil war exists in any particular nation, the provisions of the act of the 5 of June, 1794 (3 vol., 88), must be strictly enforced. Under the cover of commercial intercourse no enlistment must be permitted, except of the transient citizens or subjects of a foreign nation enlisting on board of the vessels belonging to their own country in the manner authorized by law. No vessels must be fitted for war, the force of armed vessels must not be augmented, and military enterprises must not be set on foot within the territory and jurisdiction of the United States with the intent to commit hostilities against any prince or state with whom the United States are at peace. These prohibitions, however, do not affect the right of the American citizens to sell in a course of fair trade any articles of American product or manufacture, nor the right of foreign merchant vessels to purchase and carry any such articles.

3. There are two treaties in which the subjects of Spain are interested. First, the treaty of 1795, between the

United States and Spain, and, second, the treaty of 1803 (commonly called the Louisiana Convention) between the United States and France. As Spain has not herself recognized the independence of any of her colonies, the United States still considers all her subjects to be entitled to the benefit of the first treaty. The second treaty is in the nature of a compact with France, and all who were entitled to its benefits at the time of making it continue to be entitled to them. The subjects of Spain trading directly from Spain or from her colonies (whose independence, I repeat, has not been recognized) are therefore entitled, as well as the subjects of France, to the benefit of the 7th article of the treaty for the limited period of twelve years, without regard to the commotions either in Spain or in the colonies.

The President desires that you will regulate your official conduct upon the principles that have been stated, but if any extraordinary case occurs you will report it to this Department with all possible dispatch.

I am, very respect'y, sir, yr. obt. sevt.,

A. J. DALLAS.

P. S.—Until otherwise instructed, sea letters are not to be granted to any vessels but those which are bound beyond the Cape of Good Hope.

E.

[Monroe's letter to the Spanish minister, 1816.]

DEPARTMENT OF STATE,
January 19, 1816.

The CHEVALIER DE ONIS.

SIR: * * * In reply to your third demand, the exclusion of the flag of the revolting provinces, I have

to observe that in consequence of the unsettled state of many countries, and repeated changes of the ruling authority in each, there being, at the same time, several competitors, and each party bearing its appropriate flag, the President thought it proper, some time past, to give orders to the collectors not to make the flag of any vessel a criterion or condition of its admission into the ports of the United States. Having taken no part in the differences and convulsions which have disturbed those countries, it is consistent with the just principles, as it is with the interests of the United States, to receive the vessels of all countries into their ports, to whatever party belonging and under whatever flag sailing, pirates excepted, requiring of them only the payment of the duties and obedience to the laws while under their jurisdiction, without adverting to the question whether they had committed any violation of the allegiance of laws obligatory on them, in the countries to which they belonged, either in assuming such flag, or in any other respect. * * *

What will be the final result of the civil war which prevails between Spain and the Spanish provinces in America is beyond the reach of human foresight. It has already existed many years and with various success, sometimes one party prevailing and then the other. In some of the provinces the success of the revolutionists appears to have given to their cause more stability than in others. All that your Government had a right to claim of the United States was that they should not interfere in the contest or promote by any active service the success of the revolution, admitting that they continued to overlook the injuries received from Spain and remained at peace. This right was common to the colonists. With equal justice might they claim that we would not interfere to their disadvantage; that our ports should remain open to both parties, as they were before the commencement of the struggle; that our laws regulating commerce

with foreign nations should not be changed to their injury. On these principles the United States have acted.

* * * * *

I have the honor to be, &c.,

JAMES MONROE.

F.

[Madison's special message, 1816.]

DECEMBER 26, 1816.

To the Senate and House of Representatives of the United States:

It is found that the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States.

With a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped, or in a course of equipment, with a warlike force within the jurisdiction of the United States, or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments, with the exceptions in such provisions proper for the cases of merchant vessels furnished with the defensive armaments usual on distant and dangerous expeditions, and of a private commerce in military stores permitted by our laws, and which the law of nations does not require the United States to prohibit.

JAMES MADISON.

G.

[Monroe's letter to Forsyth, 1817.]

DEPARTMENT OF STATE,
January 10, 1817.

SIR: In addition to the letter which I wrote to you on the 6th, in reply to the one which you wrote to me on the 1st instant, I have the honor to state that information has been received at this Department, from various sources, that vessels have been armed and equipped in our ports for the purpose of cruising against the commerce of nations in amity with the United States, and no doubt is entertained that this information was in some instances correct. The owners of these vessels have, however, generally taken care so to conceal these armaments and equipments, and the object of them, as to render it extremely difficult, under existing circumstances, to prevent or punish this infraction of the law. It has been represented—

1st. That vessels belonging to citizens of the United States or foreigners have been armed and equipped in our ports, and have cleared out from our custom-houses as merchant vessels; and, after touching at other ports, have hoisted the flag of some of the belligerents, and cruised under it against the commerce of nations in amity with the United States.

2dly. That in other instances other vessels, armed and equipped in our ports, have hoisted such flags after clearing out and getting to sea, and have in like manner cruised against the commerce of nations in amity with the United States, extending their depredations, in a few cases, to the property of citizens of the United States.

3dly. That in other instances, foreign vessels have entered the ports of the United States, and, availing themselves of the privileges allowed by our laws, have

in various modes augmented their armaments, with pretended commercial views; have taken on board citizens of the United States as passengers, who, on their arrival at neutral ports, have assumed the character of officers and soldiers in the service of some of the parties in the contest now prevailing in our southern hemisphere.

Information, founded upon these representations, has from time to time been given to the attorneys and collectors of the respective districts in which the armaments are stated to have been made; but, from the difficulty of obtaining the necessary evidence to establish facts on which the law would operate, few prosecutions have been instituted.

In reply to your second inquiry, I beg leave to refer to the communication from the Secretary of the Treasury to the Committee of Ways and Means, during the last session of Congress, in the case of the "American Eagle," and to the papers enclosed herewith.

I have the honor to be, &c.,

JAMES MONROE.

Hon. JOHN FORSYTH,
Chairman Com. Foreign Relations.

H.

[Monroe's Annual Message, 1817.]

* * * * *

It was anticipated at an early stage that the contest between Spain and the colonies would become highly interesting to the United States. It was natural that our citizens should sympathize in events which affected their neighbors. It seemed probable, also, that the prosecution of the conflict along our coast and in contiguous countries would occasionally interrupt our commerce and otherwise affect the persons and property of our citizens.

These anticipations have been realized. Such injuries have been received from persons acting under authority of both the parties, and for which redress has in most instances been withheld. Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest not in the light of an ordinary insurrection or rebellion but as a civil war between parties nearly equal, having, as to neutral powers, equal rights. Our ports have been open to both, and every article the fruit of our soil or of the industry of our citizens which either was permitted to take has been equally free to the other. Should the colonies establish their independence it is proper now to state that this Government neither seeks nor would accept from them any advantage in commerce or otherwise which will not be equally open to all other nations. The colonies will in that event become independent states, free from any obligation to or connection with us which it may not then be their interest to form on the basis of a fair reciprocity.

In the summer of the present year an expedition was set on foot against east Florida by persons claiming to act under the authority of some of the colonies, who took possession of Amelia Island, at the mouth of the St. Marys River, near the boundary of the State of Georgia. As this province lies eastward of the Mississippi, and is bounded by the United States and the ocean on every side, and has been a subject for negotiation with the Government of Spain as an indemnity for losses by spoliation or in exchange for territory of equal value westward of the Mississippi—a fact well known to the world—it excited surprise that any countenance should be given to this measure by any of the colonies. As it would be difficult to reconcile it with the friendly relations existing between the United States and the colonies, a doubt was entertained whether it had been authorized by them or any of

them. This doubt has gained strength by the circumstances which have unfolded themselves in the prosecution of the enterprise which have marked it as a mere private, unauthorized adventure. Projected and commenced with an incompetent force, reliance seems to have been placed on what might be drawn, in defiance of our laws, from within our limits; and of late, as their resources have failed, it has assumed a more marked character of unfriendliness to us, the island being made a channel for the illicit introduction of slaves from Africa into the United States, an asylum for fugitive slaves from the neighboring States, and a port for smuggling of every kind.

A similar establishment was made at an earlier period by persons of the same description in the Gulf of Mexico at a place called Galveston, within the limits of the United States, as we contend, under the cession of Louisiana. This enterprise has been marked in a more signal manner by all the objectionable circumstances which characterized the other, and more particularly by the equipment of privateers which have annoyed our commerce, and by smuggling. These establishments, if ever sanctioned by any authority whatever, which is not believed, have abused their trust and forfeited all claim to consideration. A just regard for the rights and interests of the United States required that they should be suppressed, and orders have been accordingly issued to that effect. The imperious considerations which produced this measure will be explained to the parties whom it may in any degree concern.

To obtain correct information on every subject in which the United States are interested; to inspire just sentiments in all persons in authority, on either side, of our friendly disposition so far as it may comport with an impartial neutrality, and to secure proper respect to our commerce in every port and from every flag, it has been

thought proper to send a ship of war with three distinguished citizens along the southern coast with instruction to touch at such ports as they may find most expedient for these purposes. With the existing authorities, with those in the possession of and exercising the sovereignty, must the communication be held; from them alone can redress for past injuries committed by persons acting under them be obtained; by them alone can the commission of the like in future be prevented.

* * * * *

I.

[Wirt's Opinion, 1818 (1 Op., 249).]

ATTORNEY-GENERAL'S OFFICE,
November 6, 1818.

DEAR SIR: I have been deliberating, as well as I could, on the course of prosecution which should be adopted against the owners, captain, and crew of the *Fourth-of-July*, privateer; and, according to the request contained in your first letter, will now give you my opinion on that course.

First. I would indict the captain and crew as pirates, under the original act of Congress, which defines piracy. The prisoners will defend themselves under the commission of Artigas. I would object to that commission going before the jury as evidence, on the ground that it is not the commission of a sovereign recognized by our Government. In the case of the Romp, in Richmond, the chief justice decided that a maritime commission, signed by the sovereign authority of the province of La Plata, furnished no justification to the crew of that vessel, because the court could not take notice of La Plata as a sovereignty until recognized by our Government,

and, consequently, could not take notice of a commission purporting to be issued under the separate authority of that province; that, in the view of the court, La Plata must be considered as a dependence of the Spanish Crown until its separate existence as a nation had been acknowledged by the executive branch of the Government. In reply to this, they will quote the decision of the Supreme Court in the case of Palmer (2 Wheaton, 634, 635); and they will insist upon the correspondence of Mr. Monroe, when Secretary of State, with Don Onis, as well as the President's message at the opening of the last session of Congress, to prove the admission of the Government that the South American colonies are to be considered as in a state of civil war.

On this limited recognition they will claim for Artigas the rights laid down in Palmer's case *qua supra*—that is, *all the rights which war authorizes;* and they will insist, under that opinion, "that persons and vessels employed in the service of the self-created government must be permitted to prove the fact of their being actually employed in such service by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of *an acknowledged state;*" that, although, under that opinion, "the seal of such unacknowledged government can not be admitted to prove itself," yet, that "it may be proved by such testimony as the nature of the case admits;" and, that "the fact that such vessel or person is so employed may be proved without producing the seal." To this there are two answers:

1. That the correspondence with De Onis and the message are not pointed at Artigas. They are to be considered in reference to the subject-matter, which alluded to a complaint of the Spanish minister touching the admission of Buenos Ayrean privateers into our ports. The section of country which Artigas holds is claimed by Por-

tugal. This war is with the King of Portugal. The system of colonial government adopted by the two monarchies is alleged to be very different; that of Spain oppressive to the colonists in an extreme degree; that of Portugal comparatively liberal. According to the writers on the laws of nations the course which a neutral holds in such wars is often directed by its sense of the justice of one side of the cause or the other; and, according to this sense, it relaxes at pleasure the rigor of its neutrality, still, however, keeping within the neutral pale. According to those writers a recognition of the independence of a revolted colony by a neutral is no cause of war to the parent nation, provided the revolted colony be in actual and exclusive possession of its territory and government. According to these principles our Government might recognize the Government of Buenos Ayres without giving just cause of war to Spain; but if the Banda Orientale, as Portugal contends, is a separate territory, belonging to a distinct sovereign, such recognition of Buenos Ayres would not extend *to that;* because the American Government may perceive a justice in the one conflict which it does not in the other.

On the same principle the recognition of a civil war in Buenos Ayres, a Spanish colony, would not by any means carry along with it, as a consequence, the recognition of a civil war even in a Portuguese colony. You will not understand me as speaking in the name of the Government of the United States as to its seeing any difference in fact between the cases of Peurrydon and Artigas. I have no authority for making any such declaration. I speak only of the inference of fact which may or may not be fairly deduced from the correspondence and message in question. Those who rely on them as establishing the admission that a civil war exists between Artigas and Portugal must show that admission on the face of those documents, and can not, for the reasons

I have given, infer argumentatively by reasoning from the one case to the other. If the prisoners fail in showing that our Government had admitted the existence of a civil war between Artigas and Portugal, then the principles laid down in Palmer's Case, *qua supra*, can have no application to the case at bar, and this case will revert to the principles established by the Chief Justice in the case of the Romp.

2. But suppose it to be taken as admitted by the Government that a civil war does exist between Artigas and Portugal, does it follow that the citizens of the United States may participate in that war? The Supreme Court have not said that Palmer was not expressly indicted as a citizen of the United States, nor is the vessel charged as being United States property; and the principles laid down by the court are to be taken *secundum rem judicatam*, and not to be extended to another case. If the Banda Orientale is to be considered as part of the province of La Plata, and, consequently, as belonging to Spain, the fourteenth article of our treaty with Spain makes the case at bar a case of piracy (see that article); and whatever rights of war Artigas may have on the ground of his being engaged in a civil war, the citizens of the United States can not mingle in that war, on this hypothesis, without being guilty of piracy. (See what Vattel says, book 3, chapter 2, section 15, as to enlisting troops in a foreign nation.)

As a branch of this opinion, the owners, etc., ought to be indicted as accessories to the piracy, under the ninth and tenth sections of the act of 1790, "An act for the punishment of certain crimes against the United States."

Secondly. I would indict them under the act of 1794, "An act in addition to the act for the punishment of certain crimes against the United States," laying a separate count under every section where the facts will warrant it. The defence here will be that Artigas is neither a

foreign prince nor his province *a state*, according to the decision in Gelston vs. Hoyt. But as the previous prosecution for piracy can fail only on the ground that *he is a prince* and *his government that of a state* (under the decision in Palmer's Case and by our Government's recognition of a civil war), the prisoners will have taken this ground from under themselves. Artigas and his province *are either a foreign prince and state* or they or not. *If they are*, the indictment will lie under the act of 1794; *if they are not*, the indictment for piracy will lie under the act of 1790.

There seems to me no possibility of escaping this dilemma but by splitting the hair and saying there are *so far* a foreign prince and state as to excuse the prisoners from piracy, but yet not so far as to subject them under the act of 1794. In the case of Gelston and Hoyt, the alleged princes and states were Petion and Christophe and St. Domingo. Our Government had never acknowledged these sovereignties, not even by the recognition of a civil war either between themselves or their parent countries; so that inference can be drawn from that case to this, if the court shall have previously excused the piracy on the ground of our recognition of a civil war. This simple recognition in Palmer's Case was considered, and decided as placing the belligerents on the same footing, for the purposes of war, as if they had been both regularly recognized sovereigns—an effect which would certainly bring the act of 1794 to bear directly on the case.

Thirdly. I would indict them under the act of 1817. As to the facts under this act, you have, I understand, only a single witness, but that there is in expectation a further proof. The grand jury, I presume, would not hesitate to find a bill on the testimony of this single witness; and if you think it unsafe to go into his trial on the evidence of this single witness, the court would,

I presume, indulge you in a continuance until the next term.

WM. WIRT.

ELIAS GLENN, Esq.,
District Attorney for the United States, Baltimore.

J.

[Dr. Wharton's criticism of *The Ambrose Light* (33 Alb. L. J., Feb. 13, 1886, p. 125.]

INSURGENTS AS BELLIGERENTS.

The following note from Mr. Becerra, minister from Colombia to the United States, was received by the Secretary of State in due course:

LEGATION OF COLOMBIA AT WASHINGTON,
Washington, April 9, 1885.

SIR: I yesterday had the satisfaction to receive a telegram from the President of Colombia, dated at the capital city of the Union on that same day, whereby that magistrate informs me that the entire Republic is now pacified, with the exception of the ports of Panama, in the State of that name, and, those of Sabanilla, Santa Marta, and Baranquilla, in the States of Bolivar and Magdalena. Active military operations, however, were still in preparation against the rebels who hold those points in our territory, and, with a view to making them more efficient, various measures of a highly important character had been adopted, two of which I have the honor, in obedience to special instructions, to bring to the knowledge of this Government.

By a first decree the Colombian Government, in the exercise of its authority, and expressly enforcing pertinent provisions of its commercial and revenue laws,

declares the ports of Sabanilla and Santa Marta, in the Caribbean Sea, and the fluvial port of Baranquilla, which is very near to Sabanilla, closed to foreign commerce. All attempts to import or export goods through the aforesaid ports, after this decree is known, will therefore be considered as illicit; any trade thus carried on will be considered contraband, and the vessels, crews, etc., engaged therein will be liable, besides forfeiting the goods, to the penalties in such cases provided by the Colombian laws.

By a second decree the Government of Colombia declares that the vessels which are now stationed at the entrance to the Bay of Cartagena, in the port of that name, in the Caribbean Sea, and which are there embarrassing and even making war upon international commerce, carried on under the flags of various friendly nations, and by means of the vessels of the lines of regular communication which have long been established, do not belong to the United States of Colombia, and they have no right to fly, as they nevertheless do fly, the flag of that nation. As a consequence, both their existence and their action, which are wholly irregular, put them beyond the pale of international law, and their proceedings, which are hostile to the peaceful operations of commerce at the entrance of a commercial port belonging to a nation which is at peace with the whole world, may in all cases be repressed by the vessels that are charged in those waters to watch over the interests of commerce in general, and over the special interests of the nations to which they respectively belong.

In informing you, Mr. Secretary of State, as I hereby have the honor to do, of the restoration of peace throughout almost the entire territory of Colombia, and of the measures adopted with a view to its restoration in the ports which are still held by the rebels, I entertain the hope that this information will be gratifying to you, and

that the decrees in question will have, in your estimation, the weight necessary to cause them to be considered as important to American commerce.

I offer you, Mr. Secretary of State, the assurance of my highest consideration.

RICARDO BECERRA.

Hon. T. F. BAYARD,
Secretary of State of the United States.

To this note Mr. Bayard, on April 24, 1885, replied, denying in the first place the international validity of a closure of ports unsustained by an efficient blockade, and asserting in the second place that "the Government of the United States can not regard as piratical vessels manned by parties in arms against the Government of the United States of Colombia, when such vessels are passing to and from ports held by such insurgents, or even when attacking ports in the possession of the National Government. In the late civil war," so Mr. Bayard's note proceeds to say, "the United States at an early period of the struggle surrendered the position that those manning the Confederate cruisers were pirates under international law. The United States of Colombia can not, sooner or later, do otherwise than accept the same view. But however this may be, no neutral power can acquiesce in the position now taken by the Colombian Government. Whatever may be the demerits of the vessels in the power of the insurgents, or whatever may be the status of those manning them under the municipal law of Colombia, if they be brought by the act of the National Government within the operation of that law, there can be no question that such vessels, when engaged as above stated, are not, by the law of nations, *pirates;* nor can they be regarded as pirates by the United States."

Both these positions are recognized in the following passage in the message of President Cleveland, sent to Congress on December 8, 1885:

"Pending these occurrences a question of much importance was presented by decrees of the Colombian Government, proclaiming the closure of certain ports then in the hands of the insurgents, and declaring vessels held by the revolutionists to be piratical and liable to capture by any power. To neither of these propositions could the United States assent. An effective closure of ports not in the possession of the Government, but held by hostile partisans, could not be recognized; neither could the vessels of insurgents against the legitimate sovereignty be deemed *hostes humani generis* within the precepts of international law, whatever might be the definition and penalty of their acts under the municipal law of the state against whose authority they were in revolt. The denial by this Government of the Colombian propositions did not, however, imply the admission of a belligerent status on the part of the insurgents."

On April 24, 1885, the brigantine *Ambrose Light*, carrying the Colombian flag, and claiming to be commissioned as a vessel of war by "Pedroa Lara, governor of the province of Baranquilla, in the United States of Colombia, with full powers conferred by the citizen president of the state," was seized by the United States gunboat *Alliance*, about twenty miles to the westward of Cartagena, and was taken to New York for adjudication as a prize. The "Government" by whom the *Ambrose Light* was commissioned, while in possession of several important ports of Colombia, and blockading others, did not claim title under the titular Government of Colombia, acknowledged as such by the United States, but was organized by insurgents against that Government. On the hearing of the libel to procure the condemnation of the *Ambrose Light*, the proofs showed, according to the

report of the case given in the Federal Reporter of Dec. 8, 1885, (1) "that she had been sold to, and legally belonged to, Colente, one of the chief military leaders of the insurgents at Baranquilla;" (2) that "none of her officers or crew were citizens of the United States;" (3) that "she was engaged upon a hostile expedition against Cartagena, and designed to assist in the blockade and siege of that port by the rebels against the established Government;" (4) that she was instructed to "fight any Colombian vessel not showing the white flag with a red cross;" (5) that "Sabanilla and a few other adjacent seaports in the province of Baranquilla, including the city of Baranquilla, had been for some months previous, and still were, under the control of the insurgents;" while (6) "the proofs did not show that any other depredations or hostilities were intended by the vessel than such as might be incident to the struggle between the insurgents and the Government of Colombia, and to the so-called blockade and siege of Cartagena."

It appears also that the correspondence between Mr. Becerra and Mr. Bayard was treated at the hearing as part of the evidence in the case. On this state of facts, Judge Brown, to adopt the statement in the carefully drawn headnotes given in the Federal Reporter, held that "in the absence of any recognition of rebel belligerency, or of an existing state of war in Colombia, either by that Government or by any other nation, the rebel commission of their own vessel as a vessel of war was, in the eye of international law, unauthorized and void; that the seizure of the vessel as piratical was technically authorized by the law of nations; but that the implied recognition of an existing state of war in the Secretary's letter of the same date prevented any condemnation of the vessel; but that as her seizure was lawful at the time, her release should be ordered on the payment of the disbursements of the proceeding."

It is not, however, with the decree so entered, but with the opinion on which it rests, that I have now to do; and I ask leave to criticise this opinion in your columns, because with an elaborateness and frankness to which I am glad to pay tribute, it takes issue with the action of an executive department of the Government in two important relations. It holds, in opposition to the note of the Secretary of State and the message of the President, that foreign insurgents when warring at sea against their titular sovereign, are to be arrested and punished by us as pirates; and it declares, contradicting herein the express statement of the Secretary of State, that the Colombian insurgents were recognized by the Secretary in April, 1885, as belligerents.

The first mistake, as I hold it, of Judge Brown arises from his failure to recognize the relation we sustain in international law to insurgents who a foreign sovereign informs us are in warfare against him. When we are notified, as we were in the present case, by a foreign sovereign that an armed insurrection is in existence within his domains, the fact is one of which we are bound to take notice. We can not, it is true, give such insurgents hospitality in our ports; nor do we release their titular sovereign, as we would do in case we recognize their belligerency, from responsibility for their acts. But while such is the case, we respond to such an announcement by applying to him and to them the rule of nonintervention in foreign disturbances on which our whole system of extraterritorial policy rests. This distinction, however, I hold that Judge Brown does not grasp. We recognize foreign insurgency by refusing to send our military and naval forces to attack its armies or its fleets, and by refusing to deliver up those concerned in it when they take refuge on our shores.

We say in such cases to the titular government, whether it be despotic or liberal, "We can not intervene to fight your battles, either on land or at sea;

neither will we surrender political fugitives who have escaped from you to our ships or our shores." But a recognition of foreign belligerency is a very different thing. It is never determined on until an insurrection has obtained permanency, and stands on something like settled parity with the Government it assails. Such a recognition is announced by a proclamation of neutrality, and is followed by placing insurgent and titular governments on the same terms of access to the ports of the sovereign by whom the proclamation has been issued. Hence, while in very many cases we have recognized foreign insurgencies, we have never recognized such insurgencies as belligerent until they have shown themselves, by long and enduring exhibition of strength, to be on something like a parity with the State against which they revolt. The Government of the United States unquestionably recognized the *insurgency* of the forces arrayed in April last against the Colombian titular Government. But it expressly declares that it did not recognize their *belligerency;* and the case of the *Ambrose Light* is, I apprehend, the first in our annals in which one of our judges, when advised that there was no such recognition, has decided that, notwithstanding such express announcement to him, belligerency was really recognized.

[Here follows a long discussion upon the definition of piracy.]

The conclusions I draw are as follows:

1. We ought not in cases of insurrection in foreign countries to acknowledge insurgents as belligerents until the insurrection establishes itself on such a basis of apparent permanency to put it at least for a time on an apparent parity with the parent state. When such a condition of things is manifest, then a proclamation of neutrality should be issued, and the insurgent vessels admitted to the same rights in our ports as are those of the Government which they assail.

2. We ought not, in any case, to interfere to suppress insurrections in foreign states by attacking either the land or the maritime forces of the insurgents. To do so would be to cast aside that policy of noninterference in foreign systems which we have heretofore followed with scrupulous conscientiousness, would render us in most cases the supporters of despotisms as atrocious as those of Yturbide, of Francia, or of King Bomba, and would when the interference was attempted on behalf of the weaker South American Governments throw such Governments permanently on our hands, and thus subject us to burdens our system could not bear. To this policy of interference there should be but two exceptions. We should interfere to prevent any European power from effecting a new lodgment on this continent. We should interfere also on the isthmus, when necessary to carry out our treaty guaranty of free transit. But beyond this our interference can not go. No matter how vehement may be the decrees of foreign Governments declaring insurgents to be traitors and pirates, those decrees it should not be for us to execute.

FRANCIS WHARTON,
Solicitor for the Department of State.

K.

[President Cleveland's proclamation, 1895.]

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

Whereas the Island of Cuba is now the seat of serious civil disturbances accompanied by armed resistance to the authority of the established Government of Spain,

a power with which the United States are and desire to remain on terms of peace and amity; and

Whereas the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established Government by accepting or exercising commissions for warlike service against it, by enlistment, or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such Government;

Now, therefore, in recognition of the laws aforesaid and in discharge of the obligations of the United States towards a friendly power, and as a measure of precaution, and to the end that citizens of the United States and all others within their jurisdiction may be deterred from subjecting themselves to legal forfeitures and penalties:

I, Grover Cleveland, President of the United States of America, do hereby admonish all such citizens and other persons to abstain from every violation of the laws hereinbefore referred to, and do hereby warn them that all violations of such laws will be rigorously prosecuted; and I do hereby enjoin upon all officers of the United States charged with the execution of said laws the utmost diligence in preventing violations thereof and in bringing to trial and punishment any offenders against the same.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this twelfth day of June in the year of our Lord one thousand eight hun-

dred and ninety-five, and of the Independence of the United States of America the one hundred and nineteenth.

[SEAL.] GROVER CLEVELAND.

By the President:

RICHARD OLNEY,
Secretary of State.

L.

[President Cleveland's proclamation, 1896.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, by a proclamation dated the twelfth day of June, A. D. 1895, attention was called to the serious civil disturbances accompanied by armed resistance to the established Government of Spain then prevailing in the Island of Cuba, and citizens of the United States and all other persons were admonished to abstain from taking part in such disturbances in contravention of the neutrality laws of the United States; and

Whereas, said civil disturbances and armed resistance to the authority of Spain, a power with which the United States are on terms of peace and amity, continue to prevail in said Island of Cuba; and

Whereas, since the date of said proclamation said neutrality laws of the United States have been the subject of authoritative exposition by the judicial tribunal of last resort, and it has thus been declared that any combination of persons organized in the United States for the purpose of proceeding to and making war upon a

foreign country with which the United States are at peace and provided with arms to be used for such purpose constitutes a "military expedition or enterprise" within the meaning of said neutrality laws, and that the providing or preparing of the means for such "military expedition or enterprise," which is expressly prohibited by said laws, includes furnishing or aiding in transportation for such "military expedition or enterprise;" and

Whereas, by express enactment, if two or more persons conspire to commit an offence against the United States, any act of one conspirator to effect the object of such conspiracy renders all the conspirators liable to fine and imprisonment; and

Whereas there is reason to believe that citizens of the United States and others within their jurisdiction fail to apprehend the meaning and operation of the neutrality laws of the United States as authoritatively interpreted as aforesaid, and may be misled into participation in transactions which are violations of said laws and will render them liable to the severe penalties provided for such violations:

Now, therefore, that the laws above referred to as judicially construed may be duly executed, that the international obligations of the United States may be fully satisfied, and that their citizens and all others within their jurisdiction, being seasonably apprised of their legal duty in the premises, may abstain from disobedience to the laws of the United States and thereby escape the forfeitures and penalties legally consequent thereon;

I, Grover Cleveland, President of the United States, do hereby solemnly warn all citizens of the United States and all others within their jurisdiction against violations of the said laws interpreted as hereinbefore explained, and give notice that all such violations will be vigorously prosecuted. And I do hereby invoke the cooperation of all good citizens in the enforcement of said laws and in

the detection and apprehension of any offenders against the same, and do hereby enjoin upon all the executive officers of the United States the utmost diligence in preventing, prosecuting, and punishing any infractions thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-seventh day of July, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] GROVER CLEVELAND.

By the President:

RICHARD OLNEY,
Secretary of State.

M.

[President Cleveland's annual message, 1895.]

* * * * *

Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbors, yet the plain duty of their Government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign states. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly fulfill every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits.

One notable instance of interference by Spain with passing American ships has occurred. On March 8 last the *Allianca*, while bound from Colon to New York, and following the customary track for vessels near the Cuban shore, but outside the three-mile limit, was fired upon by a Spanish gunboat. Protest was promptly made by the United States against this act as not being justified by a state of war, nor permissible in respect of vessels on the usual paths of commerce, nor tolerable in view of the wanton peril occasioned to innocent life and property.

The act was disavowed, with full expression of regret, and assurance of nonrecurrence of such just cause of complaint, while the offending officer was relieved of his command.

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N.

[President Cleveland's annual message, 1896.]

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The insurrection in Cuba still continues with all its perplexities. It is difficult to perceive that any progress has thus far been made towards the pacification of the island or that the situation of affairs as depicted in my last annual message has in the least improved. If Spain still holds Habana and the seaports and all the considerable towns, the insurgents still roam at will over at least two-thirds of the inland country. If the determination of Spain to put down the insurrection seems but to strengthen with the lapse of time, and is evinced by her unhesitating devotion of largely increased military and naval forces to the task, there is much reason to believe that the insurgents have gained in point of numbers, and character, and resources, and are none the less inflexible in their resolve not to succumb, without practically securing the great objects for which they took up arms. If Spain has not yet reestablished her authority, neither have the insurgents yet made good their title to be regarded as an independent state. Indeed, as the contest has gone on, the pretense that civil government exists on the island, except so far as Spain is able to maintain it, has been practically abandoned. Spain does keep on foot such a government, more or less imperfectly, in the large towns and their immediate suburbs. But, that exception being made, the entire country is either

given over to anarchy or is subject to the military occupation of one or the other party. It is reported, indeed, on reliable authority that, at the demand of the commander in chief of the insurgent army, the putative Cuban government has now given up all attempt to exercise its functions, leaving that government confessedly (what there is the best reason for supposing it always to have been in fact) a government merely on paper.

Were the Spanish armies able to meet their antagonists in the open, or in pitched battle, prompt and decisive results might be looked for, and the immense superiority of the Spanish forces in numbers, discipline, and equipment could hardly fail to tell greatly to their advantage. But they are called upon to face a foe that shuns general engagements, that can choose and does choose its own ground, that from the nature of the country is visible or invisible at pleasure, and that fights only from ambuscade and when all the advantages of position and numbers are on its side. In a country where all that is indispensable to life in the way of food, clothing, and shelter is so easily obtainable, especially by those born and bred on the soil, it is obvious that there is hardly a limit to the time during which hostilities of this sort may be prolonged. Meanwhile, as in all cases of protracted civil strife, the passions of the combatants grow more and more inflamed and excesses on both sides become more frequent and more deplorable. They are also participated in by bands of marauders, who, now in the name of one party and now in the name of the other, as may best suit the occasion, harry the country at will and plunder its wretched inhabitants for their own advantage. Such a condition of things would inevitably entail immense destruction of property even if it were the policy of both parties to prevent it as far as practicable. But while such seemed to be the original

policy of the Spanish Government, it has now apparently abandoned it and is acting upon the same theory as the insurgents, namely, that the exigencies of the contest require the wholesale annihilation of property, that it may not prove of use and advantage to the enemy.

It is to the same end that, in pursuance of general orders, Spanish garrisons are now being withdrawn from plantations and the rural population required to concentrate itself in the towns. The sure result would seem to be that the industrial value of the island is fast diminishing, and that unless there is a speedy and radical change in existing conditions it will soon disappear altogether. That value consists very largely, of course, in its capacity to produce sugar—a capacity already much reduced by the interruptions to tillage which have taken place during the last two years. It is reliably asserted that should these interruptions continue during the current year and practically extend, as is now threatened, to the entire sugar-producing territory of the island, so much time and so much money will be required to restore the land to its normal productiveness that it is extremely doubtful if capital can be induced to even make the attempt.

The spectacle of the utter ruin of an adjoining country, by nature one of the most fertile and charming on the globe, would engage the serious attention of the Government and people of the United States in any circumstances. In point of fact, they have a concern with it which is by no means of a wholly sentimental or philanthropic character. It lies so near to us as to be hardly separated from our territory. Our actual pecuniary interest in it is second only to that of the people and Government of Spain. It is reasonably estimated that at least from $30,000,000, to $50,000,000 of American capital are invested in plantations and in railroad, mining, and other business enterprises on the island. The volume of trade between the United States and Cuba, which in 1889

amounted to about $64,000,000, rose in 1893 to about $103,000,000, and in 1894, the year before the present insurrection broke out, amounted to nearly $96,000,000. Besides this large pecuniary stake in the fortunes of Cuba, the United States finds itself inextricably involved in the present contest in other ways both vexatious and costly.

Many Cubans reside in this country and indirectly promote the insurrection through the press, by public meetings, by the purchase and shipment of arms, by the raising of funds, and by other means, which the spirit of our institutions and the tenor of our laws do not permit to be made the subject of criminal prosecutions. Some of them, though Cubans at heart and in all their feelings and interests, have taken out papers as naturalized citizens of the United States, a proceeding resorted to with a view to possible protection by this Government, and not unnaturally regarded with much indignation by the country of their origin. The insurgents are undoubtedly encouraged and supported by the widespread sympathy the people of this country always and instinctively feel for every struggle for better and freer government, and which, in the case of the more adventurous and restless elements of our population, leads in only too many instances to active and personal participation in the contest. The result is that this Government is constantly called upon to protect American citizens, to claim damages for injuries to persons and property, now estimated at many millions of dollars, and to ask explanations and apologies for the acts of Spanish officials, whose zeal for the repression of rebellion sometimes blinds them to the immunities belonging to the unoffending citizens of a friendly power. It follows from the same causes that the United States is compelled to actively police a long line of seacoast against unlawful expeditions, the escape of which the utmost vigilance will not always suffice to prevent.

These inevitable entanglements of the United States with the rebellion in Cuba, the large American property interests affected, and considerations of philanthropy and humanity in general, have led to a vehement demand in various quarters for some sort of positive intervention on the part of the United States. It was at first proposed that belligerent rights should be accorded to the insurgents—a proposition no longer urged, because untimely and in practical operation clearly perilous and injurious to our own interests. It has since been and is now sometimes contended that the independence of the insurgents should be recognized. But imperfect and restricted as the Spanish government of the island may be, no other exists there—unless the will of the military officer in temporary command of a particular district can be dignified as a species of government. It is now also suggested that the United States should buy the island—a suggestion possibly worthy of consideration if there were any evidence of a desire or willingness on the part of Spain to entertain such a proposal. It is urged, finally, that, all other methods failing, the existing internecine strife in Cuba should be terminated by our intervention, even at the cost of a war between the United States and Spain—a war which its advocates confidently prophesy could be neither large in its proportions nor doubtful in its issue.

The correctness of this forecast need be neither affirmed nor denied. The United States has nevertheless a character to maintain as a nation, which plainly dictates that right and not might should be the rule of its conduct. Further, though the United States is not a nation to which peace is a necessity, it is in truth the most pacific of powers, and desires nothing so much as to live in amity with all the world. Its own ample and diversified domains satisfy all possible longings for territory, preclude all dreams of conquest, and prevent any casting of

covetous eyes upon neighboring regions, however attractive. That our conduct towards Spain and her dominions has constituted no exception to this national disposition is made manifest by the course of our Government, not only thus far during the present insurrection, but during the ten years that followed the rising at Yara in 1868. No other great power, it may safely be said, under circumstances of similar perplexity, would have manifested the same restraint and the same patient endurance. It may also be said that this persistent attitude of the United States towards Spain in connection with Cuba unquestionably evinces no slight respect and regard for Spain on the part of the American people. They in truth do not forget her connection with the discovery of the Western Hemisphere, nor do they underestimate the great qualities of the Spanish people, nor fail to fully recognize their splendid patriotism and their chivalrous devotion to the national honor.

They view with wonder and admiration the cheerful resolution with which vast bodies of men are sent across thousands of miles of ocean, and an enormous debt accumulated, that the costly possession of the Gem of the Antilles may still hold its place in the Spanish Crown. And yet neither the Government nor the people of the United States have shut their eyes to the course of events in Cuba or have failed to realize the existence of conceded grievances which have led to the present revolt from the authority of Spain—grievances recognized by the Queen Regent and by the Cortes, voiced by the most patriotic and enlightened of Spanish statesmen without regard to party, and demonstrated by reforms proposed by the executive and approved by the legislative branch of the Spanish Government. It is in the assumed temper and disposition of the Spanish Government to remedy these grievances, fortified by indications of influential public opinion in Spain, that this Government has hoped to discover the

most promising and effective means of composing the present strife, with honor and advantage to Spain and with the achievement of all the reasonable objects of the insurrection.

It would seem that if Spain should offer to Cuba genuine autonomy—a measure of home rule which, while preserving the sovereignty of Spain, would satisfy all rational requirements of her Spanish subjects—there should be no just reason why the pacification of the island might not be effected on that basis. Such a result would appear to be in the true interest of all concerned. It would at once stop the conflict which is now consuming the resources of the island and making it worthless for whichever party may ultimately prevail. It would keep intact the possessions of Spain without touching her honor, which will be consulted rather than impugned by the adequate redress of admitted grievances. It would put the prosperity of the island and the fortunes of its inhabitants within their own control, without severing the natural and ancient ties which bind them to the mother country, and would yet enable them to test their capacity for self-government under the most favorable conditions. It has been objected on the one side that Spain should not promise autonomy until her insurgent subjects lay down their arms; on the other side, that promised autonomy, however liberal, is insufficient, because without assurance of the promise being fulfilled.

But the reasonableness of a requirement by Spain of unconditional surrender on the part of the insurgent Cubans before their autonomy is conceded is not altogether apparent. It ignores important features of the situation—the stability that two years' duration has given to the insurrection; the feasibility of its indefinite prolongation in the nature of things, and as shown by past experience; the utter and imminent ruin of the island, unless the present strife is speedily composed; above all,

the rank abuses which all parties in Spain, all branches of her Government, and all her leading public men concede to exist and profess a desire to remove. Facing such circumstances, to withhold the proffer of needed reforms until the parties demanding them put themselves at mercy by throwing down their arms, has the appearance of neglecting the gravest of perils and inviting suspicion as to the sincerity of any professed willingness to grant reforms. The objection on behalf of the insurgents—that promised reforms can not be relied upon—must of course be considered, though we have no right to assume, and no reason for assuming, that anything Spain undertakes to do for the relief of Cuba will not be done according to both the spirit and the letter of the undertaking.

Nevertheless, realizing that suspicions and precautions on the part of the weaker of two combatants are always natural and not always unjustiable—being sincerely desirous in the interest of both as well as on its own account that the Cuban problem should be solved with the least possible delay—it was intimated by this Government to the Government of Spain some months ago that if a satisfactory measure of home rule were tendered the Cuban insurgents, and would be accepted by them upon a guaranty of its execution, the United States would endeavor to find a way not objectionable to Spain of furnishing such guaranty. While no definite response to this intimation has yet been received from the Spanish Government, it is believed to be not altogether unwelcome, while, as already suggested, no reason is perceived why it should not be approved by the insurgents. Neither party can fail to see the importance of early action and both must realize that to prolong the present state of things for even a short period will add enormously to the time and labor and expenditure necessary to bring about the industrial recuperation of the island. It is therefore fervently hoped on all grounds that earnest efforts for healing the breach between Spain and the

insurgent Cubans, upon the lines above indicated, may be at once inaugurated and pushed to an immediate and successful issue. The friendly offices of the United States, either in the manner above outlined or in any other way consistent with our Constitution and laws, will always be at the disposal of either party.

Whatever circumstances may arise, our policy and our interests would constrain us to object to the acquisition of the island or an interference with its control by any other power.

It should be added that it can not be reasonably assumed that the hitherto expectant attitude of the United States will be indefinitely maintained. While we are anxious to accord all due respect to the sovereignty of Spain, we can not view the pending conflict in all its features, and properly apprehend our inevitably close relations to it, and its possible results, without considering that by the course of events we may be drawn into such an unusual and unprecedented condition as will fix a limit to our patient waiting for Spain to end the contest, either alone and in her own way or with our friendly cooperation.

When the inability of Spain to deal successfully with the insurrection has become manifest, and it is demonstrated that her sovereignty is extinct in Cuba for all purposes of its rightful existence, and when a hopeless struggle for its reestablishment has degenerated into a strife which means nothing more than the useless sacrifice of human life and the utter destruction of the very subject-matter of the conflict, a situation will be presented in which our obligations to the sovereignty of Spain will be superseded by higher obligations, which we can hardly hesitate to recognize and discharge. Deferring the choice of ways and methods until the time for action arrives, we should make them depend upon the precise conditions then existing; and they should not

be determined upon without giving careful heed to every consideration involving our honor and interest, or the international duty we owe to Spain. Until we face the contingencies suggested, or the situation is by other incidents imperatively changed, we should continue in the line of conduct heretofore pursued, thus in all circumstances exhibiting our obedience to the requirements of public law and our regard for the duty enjoined upon us by the position we occupy in the family of nations.

A contemplation of emergencies that may arise should plainly lead us to avoid their creation, either through a careless disregard of present duty or even an undue stimulation and ill-timed expression of feeling. But I have deemed it not amiss to remind the Congress that a time may arrive when a correct policy and care for our interests, as well as a regard for the interests of other nations and their citizens, joined by considerations of humanity and a desire to see a rich and fertile country, intimately related to us, saved from complete devastation, will constrain our Government to such action as will subserve the interests thus involved and at the same time promise to Cuba and its inhabitants an opportunity to enjoy the blessings of peace. * * * * * * *

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Supreme Court of the United States.

No. 701.

THE UNITED STATES

vs.

THE "THREE FRIENDS," &c.

BRIEF OF W. HALLETT PHILLIPS FOR APPELLEES.

Construction of Section 5283 of Revised Statutes, prohibiting within the United States the fitting out and arming of any vessel to be "employed in the service of any foreign prince or State, or of any colony, district, or *people*, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State, or of any colony, district, or *people*, with whom the United States are at peace."

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

No. 701.

THE UNITED STATES

vs.

THE "THREE FRIENDS," &c.

BRIEF OF W. HALLETT PHILLIPS FOR APPELLEES.

The libel filed by the United States in the district court for the southern district of Florida against the tugboat *Three Friends*, alleges as cause of condemnation and forfeiture—

"That the said steamboat or steam vessel, the *Three Friends*, was on, to wit, on the 23d day of May, A. D. 1896, furnished, fitted out, and armed with intent that she should be employed in the service *of a certain people*, to wit, *certain people* then engaged in armed resistance to the government of the King of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain in the island of Cuba, with whom the United States are and were at that date at peace."

After exceptions had been filed by claimants and owners the libelant amended the libel, by the allegation, that the vessel was fitted out, etc., within the jurisdiction with intent that she should be employed "in the service of *a certain*

people then engaged in armed resistance to the government of the King of Spain." It was also alleged that the vessel was to be employed of a certain people, to wit, the insurgents in the island of Cuba, otherwise called the Cuban revolutionists.

It was also alleged that the vessel, after having been so furnished, fitted out, and armed, "*being loaded with supplies and arms and munitions of war*, and it, the said steam vessel, being then and there furnished, fitted out, and armed with one certain gun or guns, the exact number to the said attorney of the United States unknown, *and with munitions of war thereof*, with *the intent then* and there to be employed in the service *of a certain people*, to wit, *certain people* then engaged in *armed resistance* to the government of the King of Spain in the island of Cuba, and with the intent to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain in the island of Cuba, and who, on the said date and day last aforesaid, and being so furnished, fitted out, and armed as aforesaid, then and there aforesaid, from the navigable waters of the United States, to wit, from the St. Johns river, within the southern district of Florida, and within the jurisdiction of this court aforesaid, proceeded upon a voyage to the island of Cuba aforesaid with the intent aforesaid, contrary to the form of the statute in such case made and provided. And that by force and virtue of the acts of Congress in such case made and provided, the said steamboat or steam vessel, her tackle, engines, machinery, apparel, and furniture, became and are forfeited to the use of the said United States."

The libel was filed under section 5283, Revised Statutes, part of the Neutrality laws, which is as follows:

"Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or State, or of any colony, district, or *people*, to cruise or commit hostilities against the *subjects*, *citizens*, or property of any foreign prince or State, or of any

colony, district, or *people*, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States."

Exceptions were filed to the libel on the ground that it failed to show that the *Three Friends* was fitted, etc., with the intent that said vessel should be employed in the service of a foreign prince or State, or of a colony, district, or *people* with whom the United States are at peace.

It did not show in the service of what foreign prince or State or colony or district or body politic the said vessel was so fitted out.

It failed to show that said vessel was armed or fitted out or furnished with intent to be employed in the service of any body politic recognized by or known to the United States as a body politic.

These exceptions were sustained, and it was ordered that libelants have permission to amend the libel, and if not so amended within ten days, the same stand dismissed. (Rec., p. 13.)

From this order, sustaining the exceptions to the libel entered January 18, 1897, the libelants on the 23d day of January appealed to the circuit court of appeals for the fifth circuit. (Rec., p. 16.)

The district judge, in a thoroughly considered opinion, says—

"That every judicial decision, remark, or ruling where the question has been under consideration or examination appears to be in favor of the position taken by the claimants in the exceptions."

The court concludes that it was "the intention of Congress in such enactment to prevent recognized political powers from having vessels prepared for their service in the United States, but that it was not the intention to extend such prohibition to vessels fitted out to be employed by individuals or private parties, however they might be designated, for piratical or other hostilities where no protection could be obtained by a commission from a recognized government. In such case they would be held liable under the section which provides for the fitting out of a military expedition, or if they were guilty of any piratical acts upon the high seas they would become liable under the laws for the punishment of such acts. It is considered that at the time of the amendment of 1818 this construction had been declared, and the language of the amendment was in no way intended to change such construction, but was only intended to apply to the new designation of political powers, the existence of which had been recognized as belligerents if not as independents, and who were entitled to the rights of neutrals; that the libel herein does not state such a case as is contemplated by the statute, in that it does not allege that said vessel has been fitted out with intent that she should be employed in the service of any foreign prince or State, or of any colony, district, or people recognized as such by the political power of the United States."

Afterwards, the libelants having amended the libel by the insertion of the words "in the service of a certain people, to wit, 'certain people then engaged in armed resistance to the government of the King of Spain' in the island of Cuba," the court held that the objections had not been overcome and that the amendment was not material, "as it appears clearly that the word *people* is used in an individual and personal sense and not as an organized and recognized political power in any way corresponding to a state, prince, colony, or district."

The writ of certiorari has been awarded to bring the case here from the Circuit Court of Appeals.

The ground upon which the district court based its decision was that the statute proceeded under was not violated,

because section 5283 of the Revised Statutes, which embraces the third section of the act of April 20, 1818, and first section of act March 3, 1817, when it mentions the word "*people*" means "one of the denominations applied by the act of Congress to a foreign *power*." (U. S. *vs.* Quincy, 6 Pet., 443.)

The district court held that this term did not signify persons not engaged in public war, not recognized as constituting either an independent or a belligerent community; that the section was a neutrality provision; that no neutrality exists, as there had been no recognition by the United States of the belligerency of the contestants.

That the word "people," the only term which it is pretended covers the case, is only applicable to a foreign power or belligerent, is demonstrated by a reference to particular provisions of the act of 1817, carried into the act of 1818. This amended, as we have seen, the act of 1794 so as to make it read:

"In the service of any foreign prince or state, or of any colony, district, or *people*, to cruise or commit hostilities, or to aid or co-operate in any warlike measure whatever, *against the subjects, citizens, or property of any prince or state, or of any colony, district, or people with whom the United States are at peace*." (Sec. 1, re-enacted in sec. 5283, Rev. Stat.)

The word any "*people*" must be used in the sense of any "*power*," because the statute refers to the "*citizens or property* of any *people* with whom the United States are at peace;" and there is a similar use of the word in each of the succeeding sections.

Thus section 4, act 1817, now section 5286, Revised Statutes, which applies to the augmentation of force of any ship of war or armed vessel within the United States "in the service of any foreign prince or state or of any colony, district, or people, *or belonging to the subjects or citizens of any such* prince, state, colony, district or *people*." (3 Stat., 370.)

The provision applies only to neutrality, and can only operate where there is a recognized war, prosecuted by a power, whether such power be "a prince, state, colony, district, or *people*."

The term "any *people*" necessarily signifies in this connection a political entity, and not simply an unorganized number of individuals or persons.

The expressions "prince, state, or *people*" had a definite legal meaning at the time they were enacted in the legislation under review. Similar terms had been used in maritime policies of insurance and other instruments, from time immemorial, all the world over, and were well understood and defined. No head of jurisprudence was better settled than that appertaining to losses under such policies, by detention, "of all kings, princes, and *people*, of what nation, condition, or quality soever" (2 Dane Abr., 113). In the authoritative work, Marshall on Insurance (1810), the author says that under these words, which are nearly the same in the policies of all the maritime countries, the insurers are liable for all losses occasioned by arrests or detention of the ship or goods insured by the authority of any prince "*or public body claiming to exercise sovereign power under what pretense soever*" (B. 1, ch. 12, sec. 5). In the same section the author observes that the word "*people*" in the policy means *a people* or nation, not a mob. "By the word *people* in the policy is not to be understood any promiscuous or lawless rabble that may be guilty of attacking or detaining the ship; it means *a* people—that is, a nation in its collective and political capacity."

In Park Mar. Ins. (2 Am. ed., 1799), 78, it is said: "What the word *people* in this clause of a policy of insurance means has lately been judicially settled."

Nesbitt *vs.* Lushington, 4 T. R., 783, was decided in 1792. A ship was with force and violence attacked, arrested, and detained off the coast of Ireland by a concourse of lawless people for the purpose of compelling the captain to sell the corn he had on board at a certain price. The court decided

that the loss was not within the meaning of the words arrests, etc., of kings, princes, and *people*.

Lord Kenyon said the word "*people*" meant the ruling power of the country. Mr. Justice Buller said it meant *the supreme power of the country*, whatever that might be; that the word *people* did not apply to individuals, but the words kings, princes, and *people*, of what nation, condition, or quality soever, applied to "nations" in their collective capacity.

In Mauran *vs.* Insurance Company, 6 Wall., 12, this Court confirms such construction, and discusses its bearing upon our neutrality acts.

The case is of importance on account of the principles involved, and the decision was the result of great argument, participated in by Messrs. Cushing, R. H. Dana, Jr., and Horace Gray, Jr., now a member of this Court, who appeared for the plaintiff in error.

The defendant in error was represented by Messrs. Curtis and Storrow.

The immediate question was, whether a seizure of a vessel by the so-called Confederate States constituted a *capture* within the meaning of the policy.

It was contended for the policy-holder that the insurers were bound to pay under the stipulation in the policy "against the adventures and perils of the sea, fire, enemies, pirates, assailing thieves, restraints, and detainments of all kings, princes, or people of what nation or quality soever."

It was argued that the loss did not arise in consequence of any capture, seizure, or detention within the meaning of the policy; that the taking by the Confederates did not operate in law as a capture.

Chancellor Kent was quoted to the effect that the stipulation of indemnity against takings at sea, arrests, restraints, and detainments of all kings, princes, and *people, refers only to the acts of government for government purposes, whether right or wrong.* (3 Com., 302, note D, 6th edition.)

It was claimed that in whatever light such combinations of persons might be looked on by foreign powers, they must be regarded, as far as their cruisers are concerned, as pirates, in the courts of the United States.

On the other hand, it was argued that the court must take notice that a civil war existed between the United States and the so-called Confederate States; that the United States cannot, at the same time, insist that they have the belligerent rights which by the law of nations belong to a sovereign waging public war, and yet assert that there is no such public war as is known to the law of nations; that the word "capture" is applicable to a seizure by a *de facto* government or persons acting under its authority.

This contention was sustained.

It was shown that such action by an organized government, recognized in our legislation as *de facto* under our policy, entitled the captor to the immunities derived from the recognition of war and belligerency.

Reference was made to the South American conflicts; "from the time the revolt had reached the dimensions of a civil war, the Government had recognized the war and conceded equal belligerent rights to the respective parties."

Other illustrations were made of governments *de facto*, which, for certain purposes, are recognized as if they were *de jure* and regularly constructed nationalities: "The court, in the case of Nesbitt *vs.* Lushington, 4 Term, 763, fitly described the character of the government contemplated in the clause respecting the restraints, etc., of kings, prices, or *people*, viz., 'the ruling power of the country,' 'the supreme power,' 'the power of the country, whatever it might be'—not necessarily a lawful power or government, or one that had been adopted into the family of nations."

The court concluded that the so-called Confederate government, being in the possession of the supreme power of the district of country over which its jurisdiction extended, was a government *de facto*, which could make a capture

within the meaning of the policy. (Mauran *vs.* Insurance Co., 6 Wall., 12.)

No reason exists why the word "people" should have one sense when used in a maritime policy, but a different sense as used in the statute. The one assures protection against the acts of such a "people," while the other prohibits acts done in its service.

It is an historical fact, that the change in the wording of the act of 1817 from that of 1794, was for the purpose of embracing movements instigated for the benefit of the South American provinces, then recognized belligerents.

In the case of the Santissima Trinidad, Chief Justice Marshall, on circuit, remarked as follows:

"However serious may be the doubt, whether a *section of a nation struggling for its independence* may come within the prohibitions of the act [1794], there can be no doubt that *such a people* come within the more ample provisions of the law of nations. Whether Buenos Ayres be a State or not, if she is in a condition to make war and to claim the character and rights of a *belligerent*, she is bound to respect the laws of war; and the government which concedes her those rights is bound to maintain its own neutrality, unless it means to become a party to the war, as entirely as if she were an acknowledged State. She has no more right to recruit her navy within the United States than Spain would have, and this Government is as much bound to restrain her from using our strength in the war as to restrain her enemy."

1 Brock., 488; 7 Wheat., 283.

The meaning of the word "foreign prince or state" was announced in Gelston *vs.* Hoyt.

In that case the evidence was that the ship was fitted out and armed with intent that she should be employed in the service of that part of the island of San Domingo which was then under the government of Petion, to commit hostilities upon the subjects of that part of the island of San Domingo which was then under the government of Christophe.

The Court held that neither of these allegations could be supported, inasmuch as the Government of the United States had never recognized either of these governments as "a foreign prince or State."

They had not been recognized either as belligerents or as independent communities. On the contrary, our Government had acknowledged they were parts of the French possessions, and had regulated, as requested by France, our trade therewith. (3 Wheat., 323.)

In the Grand Para, 7 Wheat., 489, Chief Justice Marshall, discussing the two acts, says:

"The act of 1817, chapter 58, adapts the previous law *to the actual situation of the world* by adding to the words 'of any foreign prince or state' the words 'or of any colony, district, or people,' etc."

There had been previous declarations that the words of the act of 1794, "prince or state," did not embrace the South American countries then waging recognized civil war against Spain.

In United States *vs.* Quincy, the indictment charged that the defendant was concerned in fitting out the ship with the intent that she should be employed in the service of a foreign *people*—that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence that those provinces had been regularly acknowledged as an independent nation by the Government of the United States. The argument was that the word *people* was not properly applicable to that nation or power. The Court thus answered the objection:

"The word *people* as here used is merely descriptive of the *power* in whose service the vessel was intended to be employed, and it is one of the denominations applied by the act of Congress to a *foreign power*. The words are 'in the service of any foreign prince or state, or of any colony, district, or *people*.' The application of the word *people* is rendered sufficiently certain by what follows under the

videlicet, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word *people* is left too general. The descriptions are in no way repugnant or inconsistent with each other and may well stand together." (6 Pet., 467.)

In United States *vs.* Palmer the circuit court of the United States for the first circuit, consisting of Judges Story and Davis, divided in opinion upon certain questions, which they certified here, arising under the neutrality laws and the laws for the punishment of piracy. Some of these were as follows:

"5th. Whether any revolted colony, district, or *people* which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States as a sovereign independent nation or power, have authority to issue commissions to make captures on the high seas of the persons, property, and vessels of the subjects of the mother country who retain their allegiance. * * *

"6th. Whether an act which would be deemed a robbery on the high seas, if done without a lawful commission, is protected from being considered as a robbery on the high seas when the same act is done under a commission or the color of a commission from any foreign colony, district, or *people* which have revolted from their native allegiance, and have declared themselves independent and sovereign, and have assumed to exercise the powers and authorities of an independent and sovereign government, but have never been acknowledged or recognized as an independent or sovereign government or nation by the United States or by any other foreign State, prince, or sovereignty.

"10th. Whether any colony, district, or *people* who have revolted from their native allegiance and have assumed upon themselves the exercise of independent and sovereign power can be deemed in any court in the United States an independent or sovereign nation or government until they have been acknowledged as such by the Government of the United States; and whether such acknowledgment can be proved in a court of the United States otherwise than by some act or statute or resolution of the Congress of the

United States, or by some public proclamation or other public act of the executive authority of the United States directly containing or announcing such acknowledgment, or by publicly receiving and acknowledging an ambassador or other public minister from such colony, district, or people; and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the executive of the United States, when no public acknowledgment has ever been made, and whether the courts of the United States are bound judicially to take notice of the existing relations of the United States as to foreign States and sovereignties, their colonies and dependencies.

"11th. Whether, in case of a civil war between a mother country and its colony, the subjects of the different parties are to be deemed, in respect to neutral nations, as enemies to each other, entitled to the rights of war." * * * .

Chief Justice Marshall, March 14, 1818, delivering the opinion of the Court, observed:

"The first four questions relate to the construction of the 8th section of the 'act for the punishment of certain crimes against the United States.' The remaining seven questions respect the rights of a colony *or other portion of an established empire which has proclaimed itself an independent nation and is asserting and maintaining its claim to independence by arms.*"

Both in this observation and in the question certified the word "*people*" is construed in the sense for which we are contending and no better definition of it can be made than that given by the Chief Justice. It applies to a foreign power or "the rights of part of a foreign empire which asserts and is contending for its independence."

No less significance is to be attached to this expression because the case finally went off on the question of the construction of the piracy acts. It marks the meaning of the act by one who was a master of exposition.

The Chief Justice observes further that the rights of a colony or other portion of an established empire and the conduct "which must be observed by the courts of the Union towards the subjects of *such section of an empire* who may be brought before the tribunals of this country are equally delicate and difficult. * * * They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as, to their own judgment, shall appear wise; to whom are entrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other; may observe absolute neutrality, may recognize the new State absolutely, or may make a limited recognition of it. It may be said generally, that if the Government remains neutral and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes and which the new government may direct against its enemy. To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arraign the nation to which the court belongs against the party."

He concluded that persons or vessels employed in the service of "a self-declared government," acknowledged to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged State.

"Any colony, district, or people" are thus made to refer to a self-declared government or unrecognized State or portion of an established empire asserting its claim to independence by arms. (U. S. *vs.* Palmer, 3 Wheat., 610.)

That the provision we have been considering only applies to recognized public war and the duty of neutrality as towards foreign powers and belligerents, clearly appears when we examine the history of this legislation, executive and legislative.

On December 26, 1816, the South American wars then raging, President Madison communicated to Congress the following message:

"It is found that the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace *towards belligerent parties*, and other unlawful acts on the high seas, by armed vessels equipped within the waters of the United States.

"With a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped or in a course of equipment with a warlike force within the jurisdiction of the United States; or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments, with the exceptions in such provisions proper for the cases of merchant vessels furnished with the defensive armaments usual on distant and dangerous expeditions, and of a private commerce in military stores permitted by our laws and which the law of nations does not require the United States to prohibit." (Annals of Cong., 14th Cong., 2d sess., 1816–1817, p. 1079.)

On January 1, 1817, Mr. Forsyth, the chairman of the Committee on Foreign Relations, afterwards Secretary of State, addressed a letter to Mr. Monroe, then Secretary of State, as follows:

"I am instructed by the Committee of Foreign Relations to inquire what information has been given to the Department of State of violations or intended violations of the *neutral obligations* of the United States to *foreign powers* by the arming and equipment of vessels of war in our ports; what prosecutions have been commenced under the existing laws to prevent the commission of such offenses; what persons prosecuted have been discharged, in consequence of the defects of the laws now in force, and the particular provisions that have been found insufficient or for the want of which persons deserving punishment have escaped." (Annals of Cong., 14th Cong., 2d sess., 1816–1617, p. 1080.)

This letter was written in order to obtain the information requisite for the framing of the proper amendments to existing law, in pursuance to the President's message, which had been referred to the committee.

From the passages underscored it is seen that the mind of Congress and of the Executive was solely directed to prevent violation of the obligations of the United States as a *neutral* towards "belligerent parties," as mentioned in the message of the President, or "foreign powers," as mentioned in the letter of Mr. Forsyth.

The Secretary of State on January 10, 1817, communicated documents bearing on the inquiry of the Committee on Foreign Relations. Among these was a communication from the district attorney of Louisiana giving "an enumeration of the cases in which individuals have been prosecuted for infringing or attempting to infringe our neutrality in *aid of the governments of New Spain*, and in which vessels have been seized and libeled under the act of the 5th of June, 1794" (p. 1082).

On January 14, 1817, Mr. Forsyth, from the Committee on Foreign Relations, reported a bill defining our neutral obligations as to fitting out of cruisers more fully than had been done in the previous act of 1794, but which still retained the words "prince or State." (Annals of Cong., 14th Cong., 2d sess., 1816–1817, p. 477.)

The debate in the House on the bill for enforcing neutrality was extensive, and exhibits the clear understanding of Congress that the amendments were for the purpose of preventing aid to the South American provinces, then recognized belligerents, and that the provision as to fitting out of vessels was intended solely to prevent such aid in this country to foreign powers at war as would violate our neutral obligations.

It was developed that strong pressure had been brought to bear upon our Government to strengthen the neutrality law in order to prevent the South American colonies from

obtaining necessary aid here, and preventive measures were suggested by the Spanish minister.

The only objections to the bill were founded on the allegation that it went too far in the enforcement of our neutral obligations towards belligerents. It was, indeed, contended by Mr. Randolph that the doctrine of neutrality had no application to the case, because one party was not recognized by this Government as *independent.*

He was answered by Mr. Clay, who said:

"Whenever a war exists, whether between two independent States or between parts of a common empire, he knew of but two relations in which other powers could stand towards the belligerents. The one was that of neutrality and the other that of a belligerent. He hoped the gentleman from Virginia did not mean to contend (what would seem to be a consequence of his opinion) that we were a party to the war and an ally of Old Spain against her colonies.

"Being then in a state of neutrality respecting the contest and bound to maintain it, the question was whether the provisions of the bill were necessary to the performance of that duty.

* * * * * *

"Gentlemen have contended that this bill ought to be considered as intended merely to enforce our own laws—as a municipal regulation having no relation to the war now existing. *It was impossible to deceive ourselves as to the true character of* the measure. Bestow on it what denomination you please, disguise it as you may, it is a law, and will be understood by the whole world as a *law to discountenance any aid being given to the South American colonies in a state of revolution against the parent country.*" (Annals of Cong., 14th Cong., 2nd sess., 1816–1817, pp. 741, 742.)

In answer to Mr. Clay, Mr. Calhoun expressed in common with other gentlemen his good wishes for the cause of the South American colonies against the mother country, but that such wishes would never influence him to permit a violation of our neutral obligations.

He alluded to the nature of the contest existing in the Spanish provinces, acknowledged that its analogy to our own situation in 1776 enlisted our sympathies, but all that could be expected of us by the patriots was that we, being neutral, should do nothing to weaken their efforts or injure their cause.

On a later occasion he remarked that the law of 1794 had contemplated a war between *two independent powers*, not *one between a mother country* and *its colonies;* and *if the defect of that law could not preserve our neutral character in the war now existing in the South he was willing to adopt the remedy.* (Annals, pp. 747, 752.)

Mr. Lowndes said:

"The law of 1794, applying only to the case of war between *two independent States*, it ought, no doubt, *to be extended* to *comprehend the contest referred to between Spain and her colonies*, and not, when prosecutions are carried up to court for breaches of the law, deny that redress we profess to give. It appeared to him, by some inadvertence, however, the committee had not gone far enough in amending the act of 1794, if it be amended so as to apply to governments not acknowledged to be independent," etc. (Annals, p. 755.)

The bill, as it passed the House, contained the words "colony, district, or people" in addition to the words "prince or state." (Annals, p. 768.)

In this form it was adopted by the Senate and became a law, with an amendment not here material. (Annals, p. 205.)

The Court will notice that the act of March 3, 1817, 3 Stat., 370, is entitled "An act more effectually to preserve the neutral relations of the United States." This act deals entirely with the fitting out or employment of armed cruisers of war.

Those amendments were urged upon our Government by Spain as necessary, in order to include the South American wars, "for the purpose of putting a stop to the armaments

making in different parts of the Union, in violation of the law of nations and of the treaty existing between his Catholic Majestic and this Republic." (Chevalier de Onis, Spanish minister, to the Secretary of State, February 28, 1817.)

Soon after the bill became the law of 1817, as early as March 15, 1817, the Secretary of State wrote to the Spanish minister, and by direction of the President inclosed a copy of the act "by which the President trusts that the Spanish government will perceive a new proof on the part of the United States of a desire to cultivate friendly dispositions towards Spain." (4 Amer. State Papers, For. Relations 4, pp. 188, 189; 3 Whart. Int. Dig., sec. 396, p. 560.)

The declarations of the Executive show that from the beginning of the South American revolutions they had been recognized as belligerents by this country.

President Monroe, in 1817, sent a message to Congress in which he said:

"Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal having as to neutral powers equal rights."

In 1856 Mr. Gorostiza, the Mexican minister, complained to our Government that the Texans were being treated as belligerents, although he said the Texan movement "had not yet arrived at the point which those of the Spanish Americans had attained when the United States allowed them the same right."

He cites the principles announced by Mr. Monroe, in his message of March 8, 1822, in which he says:

"The United States has acknowledged the rights to which they (the Spanish provinces) were entitled by the law of nations, and as belligerents, so soon as their movement had assumed such a steady and consistent form as to render

their ultimate success probable, and from that period they had been permitted to enter with their vessels of war into the ports of these United States," etc.

From this the minister inferred that until such movement had acquired such a *steady and consistent form* as to render *probable* the ultimate success of the said provinces in their struggle against Spain, the United States neither acknowledged their possession of any rights as belligerents nor admitted their vessels in the American ports.

He concludes there was a great interval between the commencement of the movement and the period at which it could have acquired the steadiness and consistency deemed requisite. (Message of the President, H. R. Doc. 105, 24th Cong., 2d sess., p. 136.)

In answer to this communication the Secretary of State declined, in the name of the President, to allow the seizure of the Texan vessel or otherwise molest her. He said that such course "was in accordance with the principles in practice which have been invariably observed by this Government from the *first breaking out* of the revolution among the Spanish provinces on this continent to the present time."

It is obvious, he says, "that the exclusion of the vessel of the one party from the ports of the United States and the admission of those of the other would be inconsistent with an *impartial neutrality*, and yet the President, in the same message from which Mr. Gorostiza has quoted, states that 'through the *whole of this contest* the United States have remained neutral, and have fulfilled with the *utmost impartiality* all the obligations incident to that character.' In a previous message of December 7, 1819, he observes, 'In the civil war existing between Spain and the Spanish provinces in this hemisphere the greatest care has been taken to enforce the laws intended to preserve an *impartial neutrality. Our ports have continued to be equally open to both parties and on the same conditions.*' This language plainly refers to the *whole of the contest*, and the President is not to be understood in his subsequent message, to which Mr. Gorostiza has referred, as in-

tending to say that the vessels of either party were only permitted to enter the ports of the United States *from the period when the success of such party appeared to be probable.* The construction which Mr. Gorostiza has given to the particular passage he has cited is not only contradicted by other passages from the messages of the same executive officer, but still more strongly, if possible, by the uniform *acts* of this Government in that and similar cases. It is a well-known fact that the vessels of the South American provinces were admitted into the ports of the United States under their own or other flags from *the commencement of the revolution*, and it is equally true that throughout the various civil contests that have taken place at different periods among the States that sprung from that revolution the vessels of each of the contending parties have been alike permitted to enter the ports of this country. It has never been held necessary, as a preliminary to the extension of the rights of hospitality to either, that the chances of the war should be balanced, and the probability of eventual success determined. For this purpose it has been deemed sufficient that the party had declared its independence and at the time was actually maintaining it. * * * The exclusion of the vessels of Texas while those of Mexico are admitted is not deemed compatible with the strict neutrality which it is the desire and the determination of this Government to observe in respect to the present contest between those countries." (H. R. Doc. 105, 24th Cong., 2d sess., 141, Sept. 30, 1836; 1 Int. Law Dig., sec. 69, p. 509.)

The declarations of the department charged with our foreign relations, state the historical fact upon which the legislation now under review is largely dependent, and which was the inspiration for its enactment.

Such was the actual condition of the foreign relations of this country when the neutrality act was amended, in 1817, as to armed cruisers, by inserting words which would cover every form of recognized war then being waged by colonies or dependencies for independence. Every such contest was covered and described, either by the words a prince, a state, a colony, a district, or a *people*, each of these expressions being used to designate some *de facto* power or belligerent.

Between such contestants our Government declared it would enforce neutrality and would allow neither to fit out war vessels in our ports.

It is not strange that Congress should not have contemplated an enforcement of a neutrality provision except in a case where there were belligerents. It could not suppose that ships of war would be fitted out in our ports when there was no recognized war, or that our Government would support a fiction by refusing to recognize a state of war and yet enforce measures only applicable to such a state.

It was natural to assume that if a civil war should ever break out on the American continent the United States would recognize it as such and place both parties on an equal level as regards the enforcement of neutrality.

In the Santissima Trinidad, 7 Wheat., 337, the policy of the United States is thus declared:

"The Government of the United States has recognized the existence of a civil war between Spain and her colonies and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war."

The enforcement of neutrality, in so far as we have been considering it, has been in accordance with these views.

In the case of Texas, its belligerency was recognized from the time the declaration of independence was announced, which was contemporaneous with the outbreak of the revolution.

That the provision regarding arming and fitting out cruisers in our ports, as originally enacted in 1794, had in view only restrictions of neutrality and applied to belligerent powers alone cannot be doubted.

This provision was directed against the practices of Genet, acting on behalf of the French government, in the wars then raging in Europe.

Its origin is clearly traced:

"The practice of commissioning, equipping, and manning vessels in our ports to cruise on any of the belligerent parties is equally and entirely disapproved, and the Government will take effectual measures to prevent a repetition of it." (3 Jeff. Works, 105; 4 do., 34.)

The keynote to this legislation is found in President Washington's message, December 3, 1793, in which he says:

"The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military services, offensive or defensive, is deemed unlawful."

Mr. Wharton treats the provision under the head of "Issuing of belligerent cruisers," and the proposition which he announces as the result of the legislation is that the United States is "bound to restrain fitting out and sailing of armed cruisers of belligerents." (3 Wharton's Int. Law Dig., sec. 396, p. 551.)

In an opinion delivered in 1841, Mr. Legaré declares "the object of the act of 1818 (same in act of 1817) was to prevent all equipping of vessels of war in our ports for a *foreign power* actually engaged in hostilities with a nation with which the United States are at peace, knowing the purpose for which they are to be employed. (3 Op. Att'y Gen., 738.)

But reliance is placed, as we understand, upon the proclamations of the President during the present disturbances in Cuba as making the "insurrection sufficiently notorious and extensive to have received the attention of the Government of this country for nearly two years past, although the insurgents have not received any recognition of belligerency."

These proclamations do not lend countenance to the present position of the Government, for they do not recognize a public war existing in Cuba, much less a government or new power asserting its sovereignty.

The first proclamation of President Cleveland, June 12, 1895, mentions that "the island of Cuba is now the seat of serious *civil disturbances*, accompanied by armed resistance to the authority of the established government of Spain."

Citizens of the United States are enjoined from taking part in such "*disturbances*."

The second proclamation, July 27, 1896, mentions that "*civil disturbances* and *armed resistance* to the established government of Spain continue to prevail in said island of Cuba."

This proclamation is solely concerned with the enforcement of section 5286, Revised Statutes, regulating *military expeditions*, and refers to the decision of this Court in the case of United States *vs.* Wiborg, *supra*.

"Civil disturbances" which may proceed from brigandage or factions can hardly be deemed the equivalent of a public war, or to constitute those participating in them "a *people*," in view of the construction placed upon this expression in the judicial and political declarations of this country.

If the argument of appellant is correct, there results a condition opposed to the very conception of neutrality, for the courts would be obliged to say that those causing civil disturbance constitute "a people" for the purpose of punishment under the act, and yet would be obliged to deny to them their standing as such under the neutrality laws, because the political departments of the Government have not recognized their belligerency or political existence.

Spain would obtain all the advantages of neutrality without incurring any of its obligations; it would be the enforcement of a simulated neutrality, a neutrality in name only, as it would be entirely in her favor.

It would enable Spain to proceed against those opposing her in Cuba as engaged in civil commotion only, while calling upon this nation to assist her by enforcing a neutrality provision applying to public war waged by a belligerent.

This expression, "*any people*," cannot be disassociated from the terms which precede it—any foreign prince or State, or any colony or district.

In the language of Lord Kenyon in Nesbitt *vs.* Lushington, *supra*, "the meaning of the word '*people*' may be discovered here by the accompanying words, *noscitur a sociis*. It means, the 'ruling power of the country.'"

It would be strange, in the light of history, if all the other terms refer to the people in their collective and political capacity, a body politic or assuming to be a body politic, while this expression, "*a people*," may be construed to refer in another sense to persons in their individual capacity.

The Court can hardly treat the expressions in the President's messages as a political declaration of the existence of a colony, a district, or a *people* at war with Spain, and how can the insurgents be declared by the Court to constitute "a people" without some such declaration?

If the proclamations can be resorted to by courts as evidence of a *status* possessed by the insurgents, for one purpose, they must be equally available as establishing such *status* for all purposes of neutrality. It would not be fair to hold that these documents contain a sufficient declaration of the existence of "a people" for the purpose of punishing those who act here in their service, but not sufficient to constitute "a people" entitled to the rights of neutrality under our laws. The Court will not close its eyes and open them again to suit the pleasure of the Government for the time being.

The Government places much reliance upon the opinion of Attorney General Hoar as to the construction of the neutrality clause in question.

This opinion is thus stated by Mr. Wharton:

"The neutrality act of 1818 is not restricted in its operation to cases of war between two nations or where both parties to a contest have been recognized as belligerents—that is, as having a sufficiently organized political existence

to enable them to carry on war. It would extend to the fitting out and arming of vessels for a *revolted colony* whose belligerency had not been recognized, but it should not be applied to the fitting out, etc., of vessels for the parent State for use against a revolted colony whose independence had not in any manner been recognized by our Government." (3 Whart. Int. Law Dig., sec. 402, p. 628.)

The question before the Attorney General was different from the one now presented to the Court.

The point submitted was whether proceedings could be taken under the act against Spanish vessels fitted out in this country, on the ground that they were procured to be fitted out and armed with intent that they should be employed in the service of Spain, a foreign State, with intent to cruise or commit hostilities against the subjects, citizens, or property of a "colony, district, or people" with whom the United States were at peace, namely, a "colony, district, or people" claiming to be the *Republic of Cuba*. It was held that in the absence of any political recognition of such a State the courts must conform to the action of the Government.

It was further held that Spain could not be said to commit hostilities against any party by procuring armed vessels for the purpose of enforcing its own recognized authority within its own dominions.

Here is an admission that the hostilities were not against "*a people.*"

The attention of the Attorney General was called to the fact that libels had been filed to procure the condemnation of vessels on the ground that they were being fitted out and armed with intent to be employed in the service of a "colony, district, or *people*," viz., the "colony, district, or *people of Cuba*," and it was argued that as the Government in those libels had asserted that Cuba was a "colony, district, or *people*" capable of committing hostilities against Spain, the law equally applied to an armament procured or fitted out by Spain for the purpose of hostilities *against Cuba*.

This proposition the Attorney General denied.

We do not feel called upon to enter into the question of the soundness of the opinion.

In the present case there is no allegation that Cuba as a "colony, district, or *people*" has arisen against Spain.

The case before the Attorney General involved the assertion of a pretended government, claiming to be the *Republic of Cuba*, and therefore might well be said to come within the act as a "colony, district, or people."

The argument of inconvenience is made.

It is said that if under the present condition of affairs proceedings cannot be had against vessels under section 5283, there is no penalty provided by law. This argument, as remarked in the court below, was as applicable under the original act of 1794 as it is now, under the act of 1818, re-enacted in section 5283, Revised Statutes.

Under the first act it was held, as we have seen, that the words "foreign prince or State" did not embrace sections of an empire not recognized by the United States.

In order to cover such cases, Congress resorted to additional legislation.

It was not supposed that the courts by any argument *ab inconvenienti* could so stretch the act as to cover such cases.

The result, as we have shown, was the act of 1817, which added words to cover sections of an empire which had separated, or were endeavoring to separate, from the mother country.

There are ample provisions of municipal law to punish those who set on foot enterprises for the purpose of commiting hostilities against a power with which we are at peace.

Section 6 of the act of 1818 (3 Stat., 448), re-enacted in section 5286, Revised Statutes, prohibits military enterprises to be carried on from "thence against the *territory or dominions* of any foreign prince or State, or of any colony, district, or *people* with whom the United States are at peace."

This section provides fully for offenses against the peace of a foreign State, including enlistments.

It applies as well in times of peace as in times of war. There is no requirement that the expedition or enterprise should be in the service of any government or "*people.*"

It is only necessary that it should be directed against the territory or dominions of a "*people.*"

This use of the words "any *people*" conclusively shows that in the sense of Congress it meant a power exercising or asserting dominion, and is therefore of great significance in the argument.

Under this clause no forfeiture is provided.

For any offenses committed at sea amounting to piracy under our laws, those laws provide ample penalties.

But if at any time Spain should think it necessary for this country to enforce its law regarding the fitting out of belligerent cruisers, the remedy is in her own hands; she has but to recognize a state of war.

The act of April 20, 1818 (3 Stat., 448), is entitled "An act in addition to the act for the punishment of certain crimes against the United States and to repeal the acts therein mentioned."

This act contains the provisions regarding military enterprises and other operations directed against foreign powers.

It embraces criminal legislation of a purely domestic character, and also re-enacts the former laws affecting our neutral relations.

The United States *vs.* Wiborg, 163 U. S., 632, involved the construction of what constituted an expedition or enterprise under section 5286, Revised Statutes. This question has no immediate bearing on the case now under consideration.

No argument can properly be made on the ground that the United States has any duties to perform other than those specified in its legislation, or that citizens can be proceeded against criminally except as there provided.

This has always been determined by our Government.

Neither the United States nor Spain admits there exists a state of belligerency, and in its absence there cannot exist any obligations of neutrality.

In preparing the Foreign Enlistment act of 1819, taken from our act, Parliament added to the language of our statute, "or part of any province or people or of any person exercising or assuming to exercise any powers of government in or over any foreign State, colony, province or parts of any province, or people." (59 George III, c. 69, 7.)

This additional language was undoubtedly inserted in view of the pronounced object of the language of the amendatory acts of 1817, 1818, as applying only to an empire or sections of an empire, and in view, also, of the construction of the word "people" by our decisions and in the light of the English case of Nesbitt *vs.* Lushington, *supra*, defining the meaning of the same expression.

So entirely sufficient was the provision regarding hostile expeditions supposed to be that it was not until 1870 that Parliament, in view of the Alabama controversy, passed an act covering the fitting out of belligerent cruisers.

If we examine the modern judicial precedents in this country, in which the point has been debated, we will not find any opposition to the construction for which we contend, but much to support it.

They are fully set forth in the opinion of the court below, and need not be here largely discussed.

In United States *vs.* Wiborg, this Court, speaking through Mr. Chief Justice Fuller, say:

"Section 5283 deals with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace." (163 U. S., 632.)

In the case of the *Itata*, in some respects similar to the present controversy, the district court of the United States for the district of California, in an opinion, said as follows:

"Prior to the passage of the act of April 20, 1818, the Supreme Court of the United States, in the case of Gelston *vs.* Hoyt, 3 Wheat., 245, speaking through Mr. Justice Story, held that section 3 of the act of 1794, prohibiting the fitting out any ship, etc., for the service of 'any foreign prince or State,' to cruise against the subjects, etc., of any foreign prince or State with which the United States were at peace, did not apply to any new government unless it had been recognized by the United States or by the government of the country to which such new country belonged, and that a plea which set up a forfeiture under that act, in fitting out a ship to cruise against such new State, must aver such recognition, or it is bad.

"Congress, in passing the subsequent act of April 20, 1818, by which the provision referred to of the act of 1794 was, in substance, re-enacted, must be presumed to have known the construction that had been theretofore put by the Supreme Court upon the words 'prince or State' in the act of 1794, and with that knowledge in passing the act of 1818 inserted in the same clause the words 'colony, district, or people.' This was done, according to Dana's Wheaton, sec. 439, note 215, and Wharton's Int. Dig., p. 561, upon the suggestion of the Spanish minister that the South American provinces then in revolt and not recognized as *independent* might not be included in the word 'State.' But in every one of those instances the United States had acknowledged the existence of a state of war and, as a consequence, the belligerent rights of the provinces." (48 Fed. Rep., 99.)

At October term, 1892, the Government filed an elaborate brief in support of a petition for a certiorari to bring up this decision, but it was denied without prejudice to a renewal.

After the refusal of the motion the circuit court of appeals for the seventh circuit affirmed the decree of the district court. (The *Itata*, 56 Fed. Rep., 505.)

The Court reviewed fully the authorities which had been cited in the district court, and supplied others in support of the position that the word "*people*" only applied to a power, government, or belligerent. As the decision, however, was placed on the ground that no fitting out had been established, it was not deemed necessary to decide the question as to the application of the statute. There is no doubt, however, as to the inclination of the Court.

Attention was called to the fact that the English act was much broader than ours.

No further attempt was made by the Government to obtain a review of either of these decisions.

President Harrison was of opinion that the matter was a proper one to call to the attention of the legislature. In his message, December 9, 1891, he said:

"A trial in the district court of the United States for the southern district of California has recently resulted in a decision holding, among other things, that, inasmuch as the congressional party had not been recognized as a belligerent, the acts done in its interest could not be a violation of our neutrality laws. From this judgment the United States has appealed, not that the condemnation of the vessel is a matter of importance, but that we may know what the present state of our law is, for, if this construction of the statute is correct, there is obvious necessity for revision and amendment."

There have been several cases decided in the district courts involving the condemnation of vessels where the question as to the application of the statute was not raised or discussed by the Court. (U. S. *vs.* Mary M. Hogan; Brown, justice, 18 Fed. Rep., 528; U. S. *vs.* 214 Boxes, etc., 20 Fed. Rep., 50; The City of Mexico, 28 Fed. Rep., 148.)

The same judge who decided the first case also decided that of the *Carondelet*, 37 Fed. Rep., 800.

There the question was much discussed, and although the libel was dismissed on a different ground, the judge leaves

no doubt as to his views. The question was whether a vessel entering the service of the faction under Hippolyte, in Hayti, which had not been recognized, could be said "to enter the service of a foreign prince or State, or of a colony, district, or *people*, unless our Government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done."

The judge remarked that the statute was a highly criminal and penal one; that it was not to be enlarged by construction beyond the fair import of its terms.

In United States *vs.* Hart, the same judge said:

"Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with whom we are at peace." (*74 Fed. Rep.*, 724.)

In the case of the *Conserva*, 38 Fed. Rep., 432, Judge Benedict held that the language of section 5283, Revised Statutes, as to the commission of hostilities against the subjects, citizens, or property of a foreign prince or *people*, did not include factions engaged in insurrection who were not recognized by the United States as belligerents.

The question was whether the section applied, as neither Hippolyte nor Legitime, who were struggling for supremacy in Hayti, had been recognized by our Government as belligerent powers.

"In the absence of proof of that fact, the fitting out of a vessel with intent to enter the service of one to commit hostilities against the other is not brought within the scope of the statute."

Since the preparation of the above we have received the proofs of the Government's argument, but too late to make any extended reply thereto.

We believe, however, that we have covered or endeavored

to cover the question arising on the record, by what we have already said.

The Attorney General states the case as bringing up the question "whether the words 'colony, district, or *people*' include insurrectionary bodies like the present '*Republic of Cuba*,' whose belligerency, technically speaking, has not yet been recognized by the Executive Department of our Government."

We deny that any such question is presented by the record or can arise even if resort is had to the various official documents relied on as supplying the omissions of the libel. No such body as the "Republic of Cuba" is anywhere referred to, and the statement of the Attorney General is the first announcement of the existence of a Republic of Cuba yet made by any responsible officer of the Government.

This suggestion, unsupported by the record, is designedly made for the purpose of creating the belief that somewhere it has been stated that "certain people" or "insurgents," as stated in the libel, constituted or claimed to constitute the "Republic of Cuba."

If such was the fact a different question would be presented from that now before the Court—the case of a government, or community claiming to be a government, whether right or wrong.

In such a case argument might be admissible in support of the position that such a body or government might properly be deemed "*a people.*"

As to the reference to "the recognition of belligerency, *technically* speaking," repeated throughout the brief, we are unable to understand what is meant.

Belligerency is simply a state of war, and must be recognized as such or not recognized at all.

If it is not recognized it is because the neutral power does not care to do so or because the movement has not attained the proportions of war.

Nor can there be any mistake as to the meaning of neutrality, which is inseparable from a belligerency to which the neutral is not a party.

Neutrality is a *status* clearly defined in law, and can only arise where there is war recognized as such.

It is simply creating confusion to speak about "a recognition of insurgency" as distinguished from a recognition of belligerency.

The words "insurgents" or "revolutionists" have no legal meaning; when they are recognized by a neutral government such recognition amounts to an admission of their belligerency or independence.

But so important is it to the case of the Government that they should show an organized community or power corresponding to the word "*a people*" that, after referring to the "present Republic of Cuba," whose existence for the first time is here avowed, reference is afterwards made to the "*Cuban insurrectionary body.*" Here again we have an effort to supply the defective statements of the record so as to show a governmental organization or political entity.

As to such a "body" it is said that if the allegations of the libel are not sufficient, which state that the persons or insurgents constituted "*a people,*" the decree should be reversed, because such body *might have been described* in the libel as a "colony or district." The answer to this is that no such question is now presented. There was no such allegation in the libel nor was the court below requested to allow any such amendment.

All the Court here now can do is to decide whether, on the record presented and the charges in the libel, the court below was justified in sustaining the exceptions.

The case is one of a quasi-criminal nature, involving the forfeiture of property as a punishment for a criminal offense.

In such a case the rules of orderly procedure and adherence to law must be firmly pursued.

It is said that the history of the act tends to show "that it was intended to cover every revolutionary body, recognized or unrecognized, which made *bona fide* claims to *rights of sovereignty.*"

But where is it shown in this record that there exists "a revolutionary body claiming the rights of sovereignty?"

Reference is made to the act of March 10, 1838, c. 31, which expired in two years. This is mentioned as a "neutrality act," and it is said that the words "colony, district, or *people*" were regarded as sufficient for the case.

The fact is that the act was one of domestic legislation and not at all one of neutrality. It was aimed at certain crimes and disturbances of the peace, then threatening on the Canadian border. The words "colony, district, or *people*" are only used when it is provided that the disturbance by our citizens of the peace of such countries should constitute a crime entailing certain forfeitures.

We submit that the court below properly sustained the exceptions to the libel.

W. HALLETT PHILLIPS,
For Appellees.

165-721

165-721

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

165-721

Supreme Court of the United States.

OCTOBER TERM, 1896.

NO. 701.

Office Supreme Court, U. S.
FILED.
FEB 15 1897
JAMES H. McKENNEY,
CLERK

THE UNITED STATES, APPELLANT,

v.

THE STEAMSHIP "THREE FRIENDS," HER BOATS, TACKLE, ENGINES, Etc.

BRIEF FOR APPELLEE.

A. W. COCKRELL, of Counsel for Appellee.

THE DA COST PRINTING HOUSE, JACKSONVILLE, FLORIDA.

IN SUPREME COURT OF THE UNITED STATES

The United States, Appellant, v.	October Term, 1896
The Steamship "Three Friends," her Boats, Tackle, Engines, etc.	No. 701.

BRIEF FOR APPELLEE.

The libel, the alleged dismissal of which is assigned as error here, is based on Section 5283 of the Revised Statutes, to-wit:

"Every person who, within the limits of the United "States, fits out and arms, or attempts to fit out and arm, "or procures to be fitted out and armed, or knowingly is "concerned in the furnishing, fitting out, or arming of any "vessel, with intent that such vessel shall be employed in "the service of any foreign prince or State, or of any col-"ony, district, or people, to cruise or commit hostilities against "the subjects, citizens, or property, of any foreign prince or "State, or of any colony, district, or people, with whom the "United States are at peace, or who issues or delivers a "commission within the tertitory or jurisdiction of the "United States, for any vessel, to the intent that she may "be so employed, shall be deemed guilty of a high misde-"meanor, and shall be fined not more than ten thousand "dollars, and imprisoned not more than three years. And "every such vessel, her tackle, apparel, and furniture, "together with all materials, arms, ammunition, and stores,

"which may have been procured for the building or equip-
"ment thereof, shall be forfeited; one-half to the use of the
"informer, and the other half to the use of the United
"States."

The first ground of exception thereto:

"1. Section 5283, for an alleged violation of which "the said vessel is sought to be forfeited, makes such "forfeiture dependent upon the conviction of a person "for doing the act or acts denounced in the first sentence "of said section, and as a consequence of conviction of "such person; whereas the allegations in said libel do not "show what persons had been guilty of the acts therein "denounced as unlawful."

The issue raised on this exception requires a definite construction of the last sentence in the section:

"*And* every *such* vessel, her tackle, apparel, and furni-
"ture, together with all material, arms, amunition, and stores
"which may have been procured for the building or equip-
"ment thereof, shall be forfeited," etc.

It is clear from the conjunction "And", which begins the sentence, that forfeiture is predicated of and upon the vessel described in the preceding sentence, and, *only*, of and upon the vessel, and, only, of and upon the circumstances, acts and conduct, therein postulated.

What is meant by the words "every *such* vessel?"

The contention, below, of the Government was, that entirely *distinct* proceedings, in distinct forums, governed by entirely *different* rules of evidence, requiring an entirely *distinct* degree of proof, prevailed, in the proceedings by which the offending persons were to be ascertained and punished, from those which prevailed, under proceedings to condemn the offending thing, the vessel, to forfeiture.

The proposition, underlying this contention, is too elusive to be analyzed.

The issue raised, by this exception, does not concern the *form* of proceeding, nor the degree of proof required. The simple question is, what must be alleged in the libel to bring the forfeiture denounced within the provisons of Section 5283.

The statute is penal. And the Government, in enforcing it, cannot eliminate a single fact or circumstance, required by the statute to make out the forfeiture therein denounced.

If it be, that the libel may dispense with the allegation required to be proven of a *single* act therein prescribed, it may dispense with *another*.

What constitutes the elements making up the offense condemning the vessel to forfeiture, it is for the legislature to determine.

The Court possesses no dispensing power.

Now, of what acts, or facts, circumstances and conduct, is forfeiture predicated?

Certainly, not of the mere act of arming, etc., a vessel.

The act of arming, etc., a vessel, is punishable *only* when that act of arming, etc., done as therein provided, is accompanied by the intent, imputed to the person or persons therein specified, of doing the thing therein provided against. Is it not idle to say that the vessel may be forfeited, under this statute, for the acts or doings, therein specified, *dissociated* from the *intent* therein imputed to the persons therein specified? If it be, that the acts and doings therein specified must be accompanied with the intent therein specified before persons can be punished thereunder, it follows the vessel cannot be condemned to forfeiture otherwise than upon allegations and proof showing those acts and doings, and allegations and proof showing the

intent, therein denounced, with which they were committed.

Under any other construction, a vessel may be condemned to forfeiture, upon allegations and proof, short of those required to punish the offending persons. Whereas, the plain, imperative, unambiguous language of the statute, is "And every *such* vessel," etc.; that is, a vessel in respect of which these acts and doings have been committed; a vessel, in respect of the arming of which, this intent existed; and, equally and alike, a vessel in respect of which, the intent of the offending persons therein denounced has been ascertained by their conviction thereof

Condemnation to forfeiture is not, by the law-making power, predicated of any *other* vessel, than *such* vessel. Forfeiture is denounced against a vessel so fitted out and armed, with the *intent* therein specified, by the offending persons so fitting her out; and of which *acts* and *doings* with such intent, the offending persons have been convicted; and forfeiture is denounced against no other than "such" vessel.

In seeking, under this libel, to make a case of forfeiture, independently of and without reference to the *ascertained* guilt of the offending persons, the Government insists that the vessel identified by the statute as *such* vessel, means *the* vessel so fitted out and armed with the intent denounced, but not a vessel in respect of whose fitting out and arming offending persons have been convicted; because, speaking through the learned District Attorney, it said, and was logically forced to say, the vessel may be liable to condemnation, under this statute, and the offending persons acquitted.

In support of this unnatural, forced construction, reliance is had on

Ambrose Light, 25 Fed. Rep. 415.

This was a proceeding in *rem*, a prize case. It was

held that "the condemnation of a vessel as piratical does not imply a criminal liability of her officers and crew."

So far from being a case of prize, the proceeding against the "THREE FRIENDS" is based on one and the same section which makes the *criminal intent* of the offending persons an *essential* ingredient of their conviction, and an *essential* ingredient of the forfeiture of the vessel.

And so it is, while "as regards acts that constitute undoubted piracy, there may be valid personal defense of the officers and crew," as suggested by Marshall, Ch. J., in U. S. v. Klintock, 5 Wheat. 144-149, there can be, under Section 5283, no forfeiture of the vessel divorced from the criminal intent of the offending persons.

Nor does the case of the Palmyra, 12 Wheat. 1, in its reasoning or conclusion furnish support to the contention of the Government, that the vessel may be condemned, and the offending persons acquitted, under Sec. 5283. This was a case of seizure under the Piracy Act of March 3 1819, continued in force by the act of May 15, 1820.

Recurring to the statute, construed in the Palmyra case, and contrasting it with Sec. 5283, it is obvious the reasoning employed by Story, Justice, is wholly inapplicable to the language and intent of Congress, in enacting Sec. 5283. The one denounces *an act* of piratical aggression done or *attempted*; and forfeiture is pronounced upon the guilty thing—the instrument of *this act* of piratical aggression thus done or attempted. The other concerns itself solely with a *criminal intent* on the part of the offending persons; no act of hostile aggression, *done* or *attempted*, is made a constituent of the offense denounced. In the Palmyra case, it was held that whether a previous conviction of the offending person was a necessary basis for the proceeding in *rem*, under the statute then applied, is "of a

far more important and difficult nature." The doctrine announced, that the proceeding in *rem* was wholly independent of the proceeding in *personam*, was adjudged to be "deduced from a fair interpretation of the legislative intention apparent upon its enactment." And, in-as-much as there was "no act of Congress which provides for the personal punishment of offenders, who commit the piratical aggression" etc. "within the meaning of those acts," the construction contended for, going as it did "wholly to defeat their operation and violate their plain import," was held to be "utterly inadmissible." And, the *necessary* conclusion reached by this reasoning was that "no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature."

In the case of the Meteor, 17 Fed. Cases, 181, Betts, District Judge, held, upon an elaborate review of the authorities, that a prior conviction of the offender need not precede a condemnation of the vessel. It is submitted his reasoning, applied as it was to the section discussed, upon a consideration of the authorities cited, will not bear the test of a close analysis. On the contrary, it conducts us to the opposite conclusion.

In each of the cases cited, the proceeding was in *rem* and the forfeiture denounced was predicated upon *acts*, not upon *intent;* in each, the condemnation of the vessel was based upon the *act* done by the *vessel* as the guilty instrument, irrespective of the claimant's intent. That there are many cases, in which the ship becomes forfeited by the *acts* of the master, and that the owner impliedly submits to involve his vessel, in whatever unlawful or wanton acts may be committed by those in charge of her, is not only conceded but affirmed. But this responsibility is enforced, and the ship is regarded as the guilty instrument or thing to which the forfeiture attaches, "from the necessity of the

case as the *only* adequate means of suppressing the offense or wrong, or insuring indemnity to the injured party" as affirmed by Mr. Justice Story, in United States v. Brig 2, How. 210, quoted by Judge Betts.

Under the statute, upon which this libel is based, no *wrong doing* in which the vessel is made the guilty instrument, is required to consummate the forfeiture. The guilty intent of the offending person is attached by the mandate of the statute to the vessel, and forfeiture is denounced because of this guilty intent. The original act, Sec. 3, Ch-50, Act of June 5, 1794, lends strong support to the contention of claimants. In the structure of the section as originally passed, the language condemning the vessel to forfeiture, following upon the ascertained guilt of the offending person, was not separated from such ascertainment by the intervention of a semi-colon.

In the case of Gelston vs. Hoyt, it was argued, in this Court, in March, 1817, by Mr. Hoffman and Mr. D. B. Ogden, for defendant in error, 3 Wheaton 296, that "By every just rule of construction the proceeding by indictment against the offender and his conviction must precede the suit *in rem* and the forfeiture of the vessel. The phraseology of the act is different from all other statutes. By those statutes, the revenue officers have power to seize and proceed *in rem* against the thing seized as forfeited, independent of any criminal proceedings against the offending individuals. By this act the forfeiture of the thing is made to depend upon the conviction of the person, and the President alone has power to seize, and that only as a precautionary measure, to prevent an intended violation of the laws." The case stood over for re-argument, and was reargued February 23rd, and decided February 27th, 1818. And the act in its present form was enacted April 20th, thereafter. And although the argument of these gentlemen

prevailed on other propositions hereinafter discussed, and the Court was not required to pass upon this special contention, it could not have escaped the attention of the Congress when in April, 1818, this Statute was subjected to revision. If, in this revision, Congress had purposed to authorize a seizure and forfeiture of the thing, independent of any criminal proceedings against offending individuals, it was its duty to have recast the phraseology of the statute and put it in harmony with other statutes empowering revenue officers to seize and proceed *in rem* against the thing seized for forfeiture.

The libel excepted to, *not* only fails to allege that the necessary criminal intent of the offending persons has been in any wise ascertained; it does not even show who the offending persons are.

The language of the statute clearly shows that the act of arming must be accompanied with the specific intent therein denounced, to consummate the offense. It follows the specific intent must be laid in the identical persons, and none other, so fitting out the vessel.

Can it be tolerated that a libel setting up the existence of this essential fact, the specific intent denounced, apprises the owners of the vessel, whose property is sought to be condemned, of the nature, essence, and identity of the offense charged, when it alleges that the Government is not informed of the *names* of the persons so fitting out the vessel?

Is it not apparent, under any possible interpretation of the statute, that the *identity* of the persons, for whose intent in doing the acts denounced, the vessel is sought to be forfeited, is an *essential* of the offense charged? Can the Government establish the specific intent required without pro-

ving its existence, at the time of fitting out, etc., in the mind of the identical person so fitting out?

Can it establish the identity of *such* persons, without charging it as a part of the libel?

In no system of pleading, is it permissible to supplement paucity of allegations by fullness of proof.

Section 3 of the act of June 5, 1794, was enlarged, in its scope, by Section 1 of the act of March 3, 1817, 3, Stat. 370, in two aspects:

1st, The service, *in which* the vessel was employed, and service *against* which it was directed, equally and alike was enlarged to embrace that "of any colony, district or people, with whom the United States are at peace."

2nd, The method of service was also enlarged so as to embrace not only the cruising or committing hostilities, but also the aiding or co-operating "in any warlike measure whatever."

The punctuation clearly shows that the service in which the vessel was intended to be employed, whether in aid, or against, and equally and alike, whether for or against, is the service of a foreign prince or state, or of a colony, district, or people, with which prince, state, colony, district, or people, the United States are at peace.

But the Act, April 20, 1818, 3 Statute 448, in which the Act of March 3, 1817 was repealed, clearly exhibits the purpose of Congress to narrow the scope of the former act, under which a denounced intent, pure and simple, was made the basis of a forfeiture of a vessel, by restricting that intent to the doing of a conspicuous public fact, easily apprehended, that is, an intent *to cruise or com-*

mit hostilities. There was too much left to construction under the former statute, in the view of the Congress, where the *intent* could have been made out by establishing a purpose "to aid or co-operate in *any* warlike measure whatever."

The meaning of the act of April 18, 1818, now Section 5283 of the Revised Statutes, may be ascertained not only by what it says, but also by what, if the Government's construction be read into it, it *fails* to say, in the light of the Foreign Enlistment Act of the Mother Country, passed the *next* year.

Contrasts the two acts.

The British Act, in respect of the phrascology, under construction, reads: "In the service of any foreign prince, state or potentate, or of any foreign colony, province or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign, state, colony, province, or part of any province or people."

The points of identity and the points of departure, in the two acts, are alike instructive. It was because, in the Salvador, R. R. 3 P. C. 218, the insurgents formed a part of the province or people of Cuba, in whose service the ship was employed, as announced by the Court, that the British Statute was found applicable.

In the petition for the writ of certiorari, herein, and the argument supporting it, the opinion of Judge Locke was assailed as based upon a misinformation in chronology; and it was asserted that the phrase "colony, district or people," the learned Judge "understands to have been inserted to avoid the effect of the decision of Gelston

vs. Hoyt, 3 Wheat, 246, decided at the February Term 1818, after the belligerency of the main South American colonies was recognized by the message of President Monroe on December 15, 1817."

It is submitted there is nothing in Judge Locke's opinion to support this assertion. On the contrary Judge Locke, in tracing the history of the phrase, declares, as stated by Mr. Wharton in his work on International Law, upon the outbreak of war between the South American Colonies and Spain, upon a special message of the President to Congress upon the subject, the words "or of any colony, district or people" were added to the description of both parties contemplated, both that one in whose employment the vessel was to enter, and that one against whom hostilities were contemplated." Record, page 18. And he, further, quotes the language of President Madison, in the message of December 16, 1816, upon which the change was alleged to have been introduced.

The historical point in issue was what was the status of the South American insurgents, at the time of the enactment, in which the phrase was introduced; what was the condition of the insurgents, at this time, as to recognized belligerency, which, in the view of Mr. Madison invited this legislation?

And it was shown that Mr. Monroe who, as Secretary of State, from 1811 to 1817, when he succeeded to the Presidency, must have been familiar with the inception and progress of these revolutionary movements, in his first annual message, in December, 1817, not only recognized the belligerency of these revolutionists, but also distinctly declared:

"Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to

neither of the parties, in men, money, ships or munitions of war."

"They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights. Our ports have been open to both, and every articles * * * that either was permitted to take has been equally free to the other."

If further authority is required as to the recognized status of these revolutionists, it is furnished in the second inaugural of President Monroe, March 5, 1821, Richardson's "Messages and Papers of the President," vol. 2, p. 88, in which, adverting to the termination of the last war with Great Britain, he says: "The war between Spain and the colonies in South America, which had commenced many years before, was then the only conflict that remained unsettled. * * * This contest was considered at an early stage by my predecessor a civil war in which the parties were entitled to equal rights in our ports. This decision, the first made by any power, being formed on great consideration of the comparative strength and resources of the parties, the length of time and successful opposition made by the colonies, and of all other circumstances on which it ought to depend, was in strict accordance with the law of nations."

The claim of the government therefore, that, at the time, March 3, 1817, the phrase was put into the, statute belligerency of the Spanish-American colonies had not been formally recognized, page 3 of the petition for the writ, is wholly inadmissable. It had been recognized on "great consideration."

The case of Gelston vs. Hoyt is important, not only

because of the principles decided, but also because of the times and circumstances, under which it was argued and decided. It was an action of trespass growing out of a seizure of the "American Eagle," July 10, 1810, under the act of 1794, Ch. 50, Sec. 3.

Gelston v. Hoyt, 13 John, 560.

The collector, Gelston, sought to justify under the authority conferred by that act. His plea was held bad over the insistence of the defendant that it was good on general demurrer, and that the plaintiff by replication should have set up that Petion and Christophe were not independent princes or states and so have had the issue raised thereby tried as a question of fact. The defendant, as is shown by the bill of exceptions, had sought to prove that the ship was attempted to be fitted out and armed, and was fitted out and armed, with intent she should be employed in the service of that part of the Island of St. Domingo, which was then under the Government of Petion to cruise and commit hostilities upon the subjects, citizens and property of that part of the Island of St. Domingo then under the Government of Christophe. Replying to this contention, the Court said, page 324: "If therefore, this," that is the status of Petion, "were a fact proper for the consideration of a jury, and to be proven *in pais*, the Court below were not bound to admit the other evidence," that is the evidence rejected, "unless this fact," that is the status of Petion, "was proved in aid of the evidence, for without it no forfeiture could be incurred." "If, on the other hand, this was matter of fact," that is the status of Petion, "of which the Court were bound to take judicial cognizance, the Court were right in rejecting the evidence," because no such status had been in fact recognized.

But the libel excepted to in the pending case, does not even *allege* this primary, fundamental fact, without which "no forfeiture could be incurred."

The word "people," as used in this statute, was defined in U. S. vs. Quincy, 6 Peters 445, to be merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power."

It follows that the word, "colony," and the word "district," each is, also, descriptive of the *power* in whose service, the vessel is to be employed; each is, also, one of the denominations applied by the act of Congress to a foreign power. It is equally clear that the added words, colony, district or people, do not mean a part of a colony, a part of a district, or a part of a people or *many* people. They mean a colony, district or people, constituting a body politic, that is charged with recognized political power, a foreign power.

That it had been attempted to import into Section 5283, the effect given to Sec. 7 of the Foreign Enlistment Act, 59 Geo. III in the numerous cases, and the discussions thereof, arising thereunder, could not, it is presumed, have escaped the attention of the Supreme Court; the Itata case had been before it on application for a writ of certiorari; nor was this Court unaware of the recommendations of President Harrison to Congress based on the decision of the Itata case; nor was it unaware that the Congress had failed to respond to those recommendations, when in May, 1896, in the Wiborg case, 163 U. S. 632, it analyzed the statutes grouped under Title LXVII, Neutrality Laws; and interpreted their effect as a system.

It is apparent this Court in the Wiborg case, brought in apposition and contrast the eleven Sections from 5281 to 5291, for the purpose of defining and ascribing to each its appropriate functions in the statutory system thereby enacted, and declared that "Section 5283 deals with fitting out and arming vessels in this country in favor of one for-

eign power against another foreign power with which we are at peace."

The Court, after this analysis of the sections commented on, proceeds to set forth in terms Sec. 5286, under which Wiborg was indicted. And in the analysis of this section, the Court makes it apparent, from its terms as contrasted with Sec. 5283, theretofore quoted also at length, that Sec. 5286, while its general purpose "was undoubtedly designed to secure neutrality in wars between two other nations, or between two contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency."

That this language applies to Section 5286, and *not* to Section 5283, is obvious not only from the context, but also because Section 5286 was the only section under consideration. Its meaning and application of the facts under consideration were to be ascertained by reference to the statutory system as a whole; and the Court demonstrated, that though *this* section was placed under Title LXVII, headed *neutrality*, and though it did tend to secure neutrality in wars between foreign powers or recognized belligerencies, its operation was not necessarily dependent on such a recognized state or status of belligerency. And the Court enforces this reasoning by reference to its language following as it does the recommendations of President Washington.

Why does the Court contrast the language of Section 5286, with Section 5283 if it be not to show that while, as it says Section 5283 dealt with fitting out and arming vessels in this country in favor of one foreign power as against another with which we are at peace, Section 5286 did *not* concern itself with a state of belligerency recognized or not as waged by one foreign power against another with which we are at peace, but interdicted absolutely and

without qualification *any* person from setting on foot in this country any military expedition to be carried on from thence against the territory or domain of any foreign prince or state, or any colony, district or people with whom the United States are at peace, and wholly irrespective of the fact of a state of belligerency, *then* existing, as between states or people with whom we are at peace.

The distinction between the two sections, in which Section 5283 is confined in its operations to the conservation of neutrality between recognized belligerents, is further shown by the Chief Justice in tracing the history of Section 5286, and declaring: "The language of the section closely follows the recommendations of President Washington in his annual address of December 3, 1793," quoting it. This language is quoted more at length in United States vs. O'Sullivan, 27 Federal Cases, 375, cited and relied on by the Government, in the case at bar, and made the basis of the Circuit Court's conclusions, that what is now Section 5286, performs the functions we are insisting on, and that what is now Section 5283 performs the functions and none other ascribed to it in the Wiborg case.

President Washington, as is therein shown, in this recommendation urged upon Congress four special calls for extending the criminal code, and the Court adds:

"It is to be remarked that out of three of the above "four special calls for extending the criminal code, only "one relates to a state of neutrality, the others looking to "provisions for maintaining the sovereignty and peace of "the United States, in their relations with foreign powers "as well in peace as at war with each other."

And recurring to the language of the recommendation, it manifestly appears that the specific provision, relating to a state of neutrality, inhibiting "individuals within the United States from arraying themselves in hostility against

any of the *powers at war*," was the provision carried into Section 5283.

But, under Section 5286, the offense therein denounced, may be committed, irrespective of our obligations to observe neutrality between contending powers, irrespective of whether the service to be engaged in, is in favor of one power as against another with which we are at peace; irrespective of the *character* of the war which is in fact being waged, whether it be a war waged by an unrecognized insurrectionary force seeking to displace the government of the recognized power; or whether it be a war between recognized foreign powers; or whether a state of war is *to be* instituted by the military expedition so fitted out. And, hence, the Court was led to say while "the statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending powers recognized as belligerents, but its operation is not necessarily dependent on the existence of such a state of belligerency."

This language, as applied to Section 5286, does not in the slightest degree qualify the force of the language of the Court, that "Section 5283 deals with fitting out and arming vessels in this country in favor of *one foreign power* as against *another foreign power* with which we are at peace." And thus affirms the decision in United States vs. Quincy, 6 Peters 445, that the word "people" as used in the statute, was one of the denominations applied to a foreign power.

The contention of the Government, that the phrase "colony, district, or people," *against* whose "citizens, subjects or property," the hostile movement is directed, does not impart the same meaning, as the phrase "colony, district or people" in whose service the movement is directed, seeing that the statute does not *in terms* ascribe "citizens, subjects or property" to the latter, is inadmissible on any possible rule of construction.

It is inconceivable that there may be "a colony, district or people," *in whose service* the vessel may enter, which colony, district or people has neither "citizens, subjects or property."

A. W. COCKRELL,

of Counsel for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,

vs.

THE STEAMER "THREE FRIENDS," HER TACKLE, APPAREL, FURNITURE, ETC.

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

Brief of Calderon Carlisle, as amicus curiæ, respectfully offered to the Court.

LAW REPORTER PRINT.

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The undersigned respectfully asks the leave of the court to submit this brief as amicus curiæ.

Having in the line of professional duty studied the subject in hand he ventures, with diffidence, to hope that he may afford some aid to the court as one of its officers.

This case is brought here for review by writ of certiorari issued by this court in the exercise of the discretion conferred by the Judiciary Act of 1891.

Extraordinary circumstances induced the Secretary of State to request the Attorney General to apply for the writ of certiorari, and to ask for a speedy hearing, notwithstanding the recess of the court announced for the month of February.

The court has granted both applications and reconvenes specially during its vacation to hear the cause.

It is conceived that it must be taken as established at this hearing that it is a matter of the most pressing gravity and immediate importance, both to the Department clothed with the administratration of our foreign relations, and to that upon which devolves the administration of the laws of the United States imposing forfeitures, that an authoritative construction of Section 5283 of the Revised Statutes should be announced at this particular time by the court of last resort.

When this court denied, without prejudice, the petition for certiorari in the case of the "Itata," at the October Term, 1892, there was no public emergency requiring its consideration of the case. The civil disturbances in Chile had ceased, and the Congressional party, in whose service the "Itata" had been employed, had become the recognized government of Chile with whom the United States were in full diplomatic intercourse. For this very reason, in all probability, the application did not appear to have been made at the request of the Secretary of State, or even with his knowledge and consent, and, doubtless for the same reason, was never renewed.

In the present case the court must take judicial notice of the facts stated in the President's Proclamation of June 12, 1895, announcing that—

> "the Island of Cuba is now the seat of serious civil disturbances, accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are, and desire to remain, on terms of peace and amity."

It must further take judicial notice of the continuance of such civil disturbances and armed resistance proclaimed on the 27th of July, 1896, and announced in the annual message of the President to the Fifty-fourth Congress at this

present session; and it must also note the extent and character of the hostilities described by the President in his message and by the Secretary of State in his report.

This case is a civil proceeding in rem in admiralty. The technical niceties of the common law or of criminal proceedings have no place here. No mere informality or inaccuracy will defeat the proceeding for forfeiture under Section 5283.

> The Caroline, 7 Cr. 496; The Edward, 1 Wheat. 264; The United States *vs.* Weed, 5 Wall. 62; The Watchful, 6 Wall. 91; The Gazelle, 128 U. S. 487

An appeal from the district court in an admiralty cause suspends the sentence of that court, and the writ of certiorari herein issued removes the cause to this court, to be reviewed as if it were here pending on appeal.

> Yeaton *vs.* The United States, 5 Cr. 281; The Lucille, 19 Wall. 73; The Judiciary Act of 1891, Section 6.

The exercise of the appellate power of this court by means of the writ of certiorari, provided for by the Judiciary Act of 1891, is no innovation in principle, and is an important part of a carefully devised system to secure a wholesome supervision in certain cases by this court, notwithstanding the creation of the Circuit Courts of Appeals.

The section under which the civil proceeding in admiralty against the "Three Friends" was instituted is as follows:

> "SEC. 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or

> people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States."

I.

The main question involved is whether the Neutrality Laws of the United States and particularly Section 5283, R. S., cover the case of the Cuban Insurrection, the existence of which has been proclaimed by the President on June 12, 1895, and July 27, 1896.

Judge Locke has held that Section 5283 does not apply to a vessel fitted out and armed within the territory of the United States with intent that she shall be employed—

> "in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the Island of Cuba, to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain in the Island of Cuba, with whom the United States are and were at that date at peace" (Rec., p. 1.)—

because the libel

> "*does not allege that said vessel had been fitted out with intent that she be employed in the service of any foreign prince or state, or of any colony, district or people* RECOGNIZED AS SUCH BY THE POLITICAL POWER OF THE UNITED STATES." (Rec., p. 23.)

It is submitted that the learned judge has superadded a requirement which is not to be found either in the words or the intent of the legislature.

Of the question decided Judge Locke himself says:

> "This question has been before the courts frequently, and several times been examined and commented upon, but in no case which I have been able to find has it been so presented, unconnected with questions of fact, that there has been a ruling upon it so that it can be considered as final and conclusive."

It is to be noted however that in at least three instances there have been condemnations under Section 5283, where the vessels, munitions, etc., condemned were intended to be employed in the service of insurgents who had not been recognized by this Government, either as a body politic or as belligerents.

These cases are Mary N. Hogan, 18 Fed. Rep., p. 529; United States *vs.* One Hundred Kegs of Powder and Two Hundred and Fourteen Boxes of Arms, 20 Fed. Rep., p. 50, and the City of Mexico, 28 Fed. Rep., p. 148.

The libels, sentences and opinions in these cases are printed and filed in this case for the convenience of the court.

The decision of Judge Locke in the present case is the first which has put upon Section 5283 the construction that the colony, district or people in whose service the vessel was to be employed must be recognized as such by the political power of the Government of the United States; and his decision in this case directly overrules his own decision, in 1886, in the case of the City of Mexico.

The "City of Mexico" was proceeded against before the same judge, and in the same court, for piratical aggression under one libel, and for violation of Section 5283 under a second libel. The first was dismissed by Judge Locke;

and, under the second, the vessel was condemned, although to use his own language—

> —"there was no war in that part of the world going on, or in contemplation, except what was intended by General Delgado."

The only "colony, district or people" in whose service the vessel was intended to be employed were General Delgado and his associates.

It is to be noted that this court in U. S. *vs.* Wiborg, in speaking of the whole neutrality law, uses the following language:

> "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations or between contending parties, recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency."

The court cites as authority the opinion of Attorney General Hoar, the full text of which will be found in the pamphlet containing the statutes and proclamations filed by the Attorney General with his preliminary brief. The same learned counsel who represents the appellee in this case asserted in his brief for plaintiff in error in Wiborg *vs.* U. S., speaking of the Act of 1818:

> "This last act added a provision to cover cases arising out of the civil wars being waged between Spain and South American countries; it forbids fitting out of vessels to cruise *in the service of any colony, district, or people.*
>
> "THIS WAS INTENDED TO APPLY TO UNRECOGNIZED GOVERNMENTS."

The words "colony, district or people" aptly designate any communities or individuals not recognized as political powers.

Judge Locke has dismissed the libel in the case of the "Three Friends" on a construction of the statute which absolutely prevents its application to any case of insurrection or civil war where there is not a recognition of the insurgents as a body politic. In other words where the insurgents are not recognized for some purpose as a "prince or state."

The fallacy of Judge Locke's method of approaching the question of the construction of section 5283, and his method of reasoning about it results, from a failure to observe at the outset the fair and primary meaning of the words used.

"Foreign prince or state," comprehends every form of foreign government recognized as such by the laws of the United States and by the law of nations. Foreign "district, colony or people" comprehends every fraction of the territory, subjects or citizens of any foreign prince or state, which fraction is *not* recognized as a foreign prince or state by the laws of the United States or by the law of nations. And to make the enumeration broader still while the adjective "foreign" is applied to "prince or state," it is not applied to the words "colony, district or people." The words are "or of any colony, district or people."

What this court said in Gelston *vs.* Hoyt, was that Congress had in the Act of 1794 limited the statute to vessels intended to be employed in the service of any foreign prince or state to cruise or commit hostilities against another foreign prince or state, and these words imported a necessity in our own law and in the law of nations that they should be recognized as such by the United States. When Congress added the words "colony, district or people," which words of themselves import no necessity of any recognition by the United States under their own laws, or under the law of nations, nothing was said as to civil war, or belligerency, or

existing insurrection; nothing was meant to depend on these conditions. The words used required no pre-existing conditions of any kind to make unlawful under the act, fitting out, etc., of a vessel with intent that she be employed in the service of any colony, district or people to cruise or commit hostilities against a nation at peace with the United States, or any part or fraction of its territory or inhabitants.

This court in Gelston *vs.* Hoyt simply decided that the words in the Act of 1794 "foreign prince or state" would not cover any fraction of the territory or people of a foreign prince or state. A foreign prince or state could only be known to our courts by their recognition as such by the political department of the Government. When Congress superadded to the words "prince or state" the words "or of any colony, district or people," it simply declared that courts should no longer in any sense be dependent on the political department for the application of the statute; for the prohibited hostilities must not be prepared on our territory, whether in the service of a recognized foreign prince or state, or of any colony, district or people, foreign or domestic; nor against any foreign prince or state, or any colony, district or people with whom we were at peace; that our compacts of peace with foreign princes and states, which were made "*without exception of persons or places*," should not be endangered or broken by any person whomsoever, by means of any pretence of limiting the service or the hostility by exceptions "*of persons or places.*"

It is true that Chief Justice Marshall said in the case of the "Gran Para" that the words colony, district, or people, were added to meet the altered condition of the world, but no such question as is here raised was before him. His general statement was entirely accurate, and to meet the altered condition of the world, Congress chose to use the widest enumeration possible, and cannot on any sound principle of construction be held to mean the same thing in any sense by the words added as by the original words.

Any colony, means any colony which is not a foreign prince or state in any sense. Any district means any geographical subdivision of the territory of a prince or state which is not a foreign prince or state in any sense, or a colony in any sense; and any people, means any people, which or who, collectively or individually, are not in any sense a foreign prince or state, or a colony, or a district.

In fine, the statute so worded is clearly meant to cover any case of hostility from our territory against a friendly foreign prince or state, without exception of persons or places, either as to the service in which the hostilities are to be committed, or as to the object against which the hostilities are to be committed.

The words "colony, district or people" were used in Statutes both before and after 1818.

The words "colony, district, or people" were first introduced into the statutes of the United States by the Act of March 3, 1817 (3d Stat. at L., p. 370). The history of this act was spread before the world by the United States at Geneva (Case of U. S., pp. 138–9):

> "The facts appear to be these: On the 20th December, 1816, the Portuguese Minister informed the then Secretary of State (Mr. Monroe) of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that the Government was at war with the 'self-styled Government of Buenos Ayres.' He further stated that he did not make the application in order 'to raise altercations or to require satisfaction,' but that he solicited 'the proposition to Congress of such provisions by law as will prevent such attempts for the future,' being 'persuaded that my (his) magnanimous sovereign will receive a more dignified satisfaction, and worthier of his high character, by the enactment of such laws by the United States.' Mr. Monroe replied, on the 27th of the same month, 'I have communicated

> your letter to the President, and have now the honor to transmit to you a copy of a message which he has addressed to Congress on the subject, with a view to obtain such an extension, by law, of the executive power as will be necessary to preserve the strict neutrality of the United States, . . . and effectually to guard against the danger in regard to the vessels of your Sovereign which you have anticipated.' The Act of 1817 was passed and officially communicated to the Portuguese Minister on the 13th of March, 1817."

This act was limited to two years and was repealed by the permanent Act of April 20, 1818—substantially re-enacting the provisions of the law of 1817.

The words "colony, district or people" have been since retained in all subsequent legislation on this subject. The words occur in the act passed in 1838, which was only in force for two years—the Case of the United States at Geneva (pp. 133 and 134), gives the following history of the act:

> "The Act of 1838 was enacted on the suggestion of Great Britain: In the year 1837 a formidable rebellion against Great Britain broke out in Canada. Sympathizers with the insurgents beginning to gather on the northern frontier of the United States, Mr. Fox, the British Minister at Washington, 'solemnly appealed to the Supreme Government promptly to interpose its sovereign authority for arresting the disorders,' and inquired what means it proposed to employ for that purpose. The President immediately addressed a communication to Congress, calling attention to defects in the existing statute, and asking that the Executive might be clothed with adequate power to restrain all persons within the jurisdiction of the United States from the commission of acts of the character complained of. Congress thereupon passed the Act of 1838."

It can hardly be said that the United States recognized the Canadian insurgents, as a "political power" by this

act. The President in his message had said to Congress that the existing laws were adequate and applicable to the *punishment* of offenders, but that what was needed was additional means of *prevention*. Nobody suggested in Congress that the existing laws did not apply to Canadian insurgents, and that they only applied to recognized belligerents. The suggestion would have been most pertinent if it had occurred to anybody because Congress was invited to give greater power to the Executive for the prevention of offenses against *existing* laws. The President and Congress both in effect asserted that existing laws applied to the Canadian insurgents, that there was ample provision for the punishment but not for the prevention of violations of existing laws. No new offense was created by the Act of 1838, but Congress itself by that act applied the provisions of the Act of 1818 to the case of unrecognized Canadian insurgents.

The words "prince or state" cover every political power recognized as such by the United States, and the added words every unrecognized fraction of the territory or inhabitants thereof.

The words used in the original Neutrality Act of 1794, "prince or state," cover every recognized political power known to the law of nations.

In the first section of the Act of 1818, now Section 5281 of the Revised Statutes, the same provisions were contained as in the first section of the Act of June 5th, 1794, except that the commission therein prohibited was not limited to a commission to serve a foreign prince or state, but was forbidden in the case of a foreign colony, a foreign district, or a foreign people, who in the sense of the law of nations could only be known to the United States as portions of the territory, or citizens, or subjects of some foreign prince or state. The same modification

of the second section of the Act of 1794 was made by the second section of the Act of 1818, now Section 5282.

In the third section of the Act of 1818, now Section 5283 of the Revised Statutes, an additional modification is introduced. Instead of continuing after the words "prince" and "state," the additional words superadded in the preceding section, the words "or of any" are inserted after the words "prince" and "state," a comma follows the word "state," and the succeeding words are separated from the qualification "foreign," left to apply to "prince or state," but excluded by the words "or of," and the broad word "any" from application to the words "colony, district or people," which follow.

The sovereign rights of peace and war belong, within the territory of the United States, exclusively to the Federal government. They are not here to be exercised by or in the service of any foreign prince or state or of any colony, district, or people, foreign or domestic.

The usual form of treaties of peace is that of the treaty with Spain of 1795:

> "There shall be a firm and inviolable peace and sincere friendship between his Catholic Majesty, his successors and subjects, and the United States and their citizens, *without exception of persons or places.*"

The same form of expression is repeated in the treaty between Spain and the United States of 1819. The peace provided for by this treaty is a peace between the United States and their citizens, and every colony, district or people within the territory, jurisdiction or control of the United States, and the King of Spain, and his subjects and every colony, district or people within his territory, jurisdiction or control.

The whole purpose of the so-called Neutrality Laws of the United States from 1794 down to the present day was to prevent the citizens or inhabitants of the United States from making war upon any nation, or upon the citizens or parts

of such nation, with whom the United States were at peace. The original act, by its broad enumeration of only foreign princes or states, made possible certain technical objections in proceedings in municipal courts, which would tend to defeat the purpose of Congress in passing the act. The situation of the colonies, districts or peoples in South America naturally attracted the attention of the legislature, but Congress did not by any apt words in any wise limit or control the words "colony, district, or people," or make any requirements as to political recognition.

In Section one of the Act of March 3, 1817, and in Section three of the Act of 1818, now Section 5283 of the Revised Statutes of the United States, it was plainly declared that it should be unlawful within the limits of the United States to fit out and arm, or procure to be fitted out and armed, or knowingly to be concerned in the furnishing, fitting out or arming of any vessel, with intent that such vessel shall be employed in the service, not only of any foreign prince or state, which description includes every form of foreign government known to the law of nations, and recognized by the United States as a foreign government, but in the service of any colony, any district or any people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace.

If a foreign colony, district or people are still for every purpose a part of the mother country, the United States are at peace with them by reason of their engagements with the mother country, and the legislature has forbidden the employment in their service of a vessel to cruise or commit hostilities against the subjects, citizens or property of the prince or state, to which they belong.

If the colony, district or people has in any way, or for any purpose, separated itself or themselves, from the mother country, the prohibited acts are none the less, and not a

whit more, forbidden by the plain provisions of the act. What the United States is interested in is that no acts of war shall be committed from her territories against any foreign prince or state, or any part of the territory of any foreign prince or state, or against the subjects or citizens of any foreign prince or state, or against the property of any foreign prince or state, or of any colony, district or people with whom the United States are at peace, by any person whatsoever, acting on his own authority, or on that of some foreign prince or state, or of any colony, district or people, The United States alone holds within her territory the sovereign right of war, and as a matter of reasonable municipal administration it was proper to provide for the punishment of every unauthorized act, which should either in itself amount to war or have a tendency to provoke war. The acceptance and exercise of a commission to serve in war, the enlistment of troops or sailors, the furnishing, fitting out or arming of any ship or vessel to cruise or commit hostilities, the augmentation of force of any armed vessel, the beginning, setting on foot, providing or preparing the means for, any military expedition or enterprise were all acts, which the United States could not suffer any individual or collection of individuals, whether citizens or foreigners, or any foreign prince or state, or part of the territory of a foreign prince or state, to do of their own authority within the territories of the United States, and having the clear right to forbid all of these acts, and the clear duty to itself and to foreign nations, to prevent unauthorized acts from disturbing its peaceful relations, it has distinctly forbidden to everybody every form of warfare from its territories against every foreign nation, with whom it is at peace, and against all the subjects, citizens, parts and divisions of those nations.

If, as can hardly be doubted, this is the clear intent of the legislation of the United States, plainly expressed in its laws, what a monstrous suggestion it is that acts of war may

be innocent, when committed in favor of, or in the service of, unrecognized insurgents, as to whom the United States deny to the mother country all rights of war upon the high seas, leaving her to deal as best she may with the insurrection within her borders, but that similar acts would become criminal under the municipal laws of the United States the moment the United States accorded belligerent rights, or recognized in any other qualified form the insurgents as distinct from the Spanish Government.

Distinction between "the service of" and "hostilities against" any colony, district or people.

The statute uses the words "colony, district or people," in two relations:

First, that the vessel is to be employed—

> "in the service of any foreign prince or state or of any colony, district or people."

Second, that the intent must be—

> "to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people with whom the United States are at peace."

Under the first relation, it is as clearly applicable to an insurrection, as to a war, the enumeration being intended to prohibit the fitting out, etc., within the territory of the United States of vessels to cruise or commit hostilities in the service of any foreign nation, recognized as such by the political power of the United States, all of which they fully, accurately and exhaustively describe under the words "prince or state," or in the service of any fraction of a foreign power not recognized as such by the political authorities of the United States, or of any colony, district or people, whether the "colony" of a foreign country anticipating insurrection, or already in a state of insurrection; or

a "district" of a foreign country; or a "people" in a foreign country; or in the service of a colony of individuals, native or foreign, about to go out from the territory of the United States to commit hostilities, to establish themselves by force against, and within the territory of a friendly foreign government, or any part of it; or in the service of any district of the United States, (none of which districts have power of peace and war), whether it be a judicial district, as the Southern District of Florida, a geographical district as the district south of Mason and Dixon's Line, or a constitutional district, as the District of Columbia; or in the service of *any people*, "people" who are subjects of a foreign prince or state, the "people" of any portion of the territory of a foreign prince or state, the "people" of the United States, or any portion thereof, or even in the service of some unknown, unrecognized "people" in the heart of Africa.

There is no indication of any intent, and no requirement in any of the words used that the colony, district or people, in whose service the vessel was to be employed should be recognized as such by the political power of the United States.

When, however, the words "colony, district or people" are construed in their other relation, in connection with the word "hostilities," then it may be important that belligerency should be recognized. A sovereign lawfully suppressing insurrection within his own borders, so long as the insurrection is not recognized as a civil war, conferring belligerent rights upon the insurgents, cannot be said to be committing hostilities.

See opinion of Attorney General Hoar, 13 Op., p. 177.

The moment such belligerency *is* recognized he is committing hostilities and the law applies to his acts, as well as to those of the insurgents, not because Congress has required any action by the political department to explain

its meaning or apply its law, but because the political department having taken a step with certain recognized consequences under the law of nations, those consequences follow, and what were not hostilities before, come to be such.

The words "to cruise" can only be applicable where the colony, district or people against which the cruising is to be done, has a naval power, or a commerce afloat, and when the nation fitting out the cruiser is undertaking to exercise rights of war on the high seas. It cannot apply to a patrol of a nation's own coast, and wherever the word "cruise" would properly apply to the mother country it might be said that the belligerency of the colony, district or people against whom the cruising was to be done, must, in the sense of the statute, be necessarily recognized.

II.

The release on bond of a vessel libelled for forfeiture under Section 5283, before answer or hearing and against the objection of the United States, is wholly unauthorized.

Admiralty Rule 10 of this court provides for the sale of perishable articles or for their delivery upon security to "*abide by and pay the money awarded by the final decree.*"

Rule 11 is as follows:

> "In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned."

These rules were promulgated by the court in pursuance of the Act of August, 1842, Ch. 188, and it is submitted that they confer no power on a judge of a district court to release a vessel, before answer or hearing and against the opposition of the United States, in a case of libel for forfeiture under the neutrality law.

Section 938 of the Revised Statutes provides for the release on bond of any vessel, goods, wares or merchandise—

> "seized and prosecuted *under any law respecting the revenue from imports or tonnage or the registering and recording, or the enrolling and licensing of vessels.*"

Section 939 provides for the sale of vessels—

> "*condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bond shall not have been given,*" etc.

Section 940 authorizes the judges to do in vacation everything that they could do in term time in regard to bonding and sales, and to—

> "exercise every other incidental power necessary to the complete execution of the authority *herein* granted."

Section 941 provides that—

> "when a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, *except the cases of seizure for forfeiture under any law of the United States,* the marshal shall stay the execution of such process or discharge the property arrested, if the process has been levied on receiving from the claimant of the property a bond or stipulation *in double the amount* CLAIMED *by the libellant.*"

It would thus appear that Sections 938 and 939 are confined absolutely to seizures, prosecutions and forfeitures under the enumerated statutes of the United States respecting revenues from imports or tonnage, or the registering

and recording, or the enrolling and licensing of vessels. That Section 940 which is taken from the same original acts is simply meant to authorize the exercise of the statutory power given by the two preceding sections in vacation as well as in term time, and that Section 941 does not apply to any case of seizure for forfeiture under any law of the United States and is by its terms confined to the case of a money demand which a libellant is seeking to enforce by a proceeding in rem in a court of admiralty.

The vessel should be recalled on the ground that the order of release was improvidently made.

Mr. Justice Clifford calls attention in U. S. *vs.* Ames, 99 U. S., p. 39, to the fact that these sections are applicable to seizures under the revenue and navigation laws.

In the same case, Mr. Justice Clifford, after alluding to those authorities which deny the power of the admiralty court to recall property for any purpose, after a stipulation for value has been given and the property has been delivered to the claimant, says (99 U. S. page 41):

> "Other decided cases, perhaps for better reason, hold that in case of misrepresentation or fraud, *or in case the order of release was improvidently given without any appraisement or any proper knowledge of the real value of the property, it may be recalled before judgment where the ends of justice require the matter to be reconsidered.*"

It is to be noted that the suit of the United States *vs.* Ames was an equity suit, and what Mr. Justice Clifford says in the succeeding part of his opinion in regard to the power of the admiralty court is applicable to all the courts of admiralty, as is clearly indicated by his calling attention

to the fact that no application was made either to the district or circuit court in the admiralty cause to recall the property. Indeed he says, page 43:

> "Proceedings in rem are exclusively cognizable in the admiralty, and the question whether a case is made for the recall of property released under bond or stipulation in such a case must, beyond all doubt, be determined by the courts empowered to hear and determine the matter in controversy in the pending suit."

It is the duty of the district courts to refuse to release vessels libelled under Section 5283.

It is submitted that the correct view of the duty of the admiralty courts of the United States in cases arising under Section 5283 is taken by Judge Brown in the case of the "Mary N. Hogan," 17 F. R., p. 813, when he refused to release that vessel on stipulation. The learned judge uses the following language:

> "In the great majority of cases suits are brought, and the arrest of the vessel is made, for the purpose only of securing payment of some pecuniary demand. In such cases the object of the suit will be fully secured by permitting a good bond, with sureties, to be substituted as security in place of the vessel during the pendency of the litigation; and thereby not only is the great expense of keeping the vessel in custody for a considerable period avoided, but the vessel is also allowed in the meantime to be engaged in the pursuits of commerce. Rule 11 is clearly designed for this purpose."
>
> "It is not in form imperative in all cases of the arrest of vessels, but provides only that the vessel 'may' be delivered, etc., thus leaving to the court a discretion which may be rightly exercised under peculiar circumstances, *and, as it seems to me, the rule clearly should not be applied in those cases where the object of the suit is not the enforcement of any money*

demand, nor to secure any payment of damages, but to take possession of and forfeit the vessel herself, in order to prevent her departure upon an unlawful expedition in violation of the neutrality laws of the United States. Such by the statements of the libel appears to be the sole object of this suit, and *to permit the vessel* as soon as arrested, *to be bonded by the very persons alleged to be engaged in this unlawful* expedition, and bonded *presumably* for the purpose of immediately prosecuting it, *would be to facilitate in the most direct manner the unlawful expedition,* and would practically defeat the whole object of the suit *and render the Government powerless by legal proceedings to prevent the violation of its international obligations.*"

"No section of the statutes other than Section 5283 fully meets the circumstances of this case. *That section is rightly invoked to enable the Government to preserve itself from large possible liabilities through a violation of its treaty obligations to Hayti.* IT IS CLEARLY NOT THE INTENTION OF SECTION 5283 IN IMPOSING A FORFEITURE TO ACCEPT THE VALUE OF THE VESSEL AS THE PRICE OF A HOSTILE EXPEDITION AGAINST A FRIENDLY POWER, which might entail a hundred-fold greater liabilities on the part of the Government. *No unnecessary interpretation of the rules should be adopted, which would permit that result.* And yet such might be the *result, and even the expected result,* of a *release of the vessel on bond.* The plain intent of Section 5283 is effectually to prevent any *such expedition,* altogether, through the seizure and forfeiture of the vessel herself. The Government is therefore entitled to retain her in custody, and Rule 11 cannot be properly applied to such a case."

It is to be noted that the expedition spoken of by the learned judge is not simply a "*military* expedition or enterprise," but a *hostile* expedition, *i. e.*, an expedition to commit hostilities.

The judge also, in the same opinion, makes the following statement:

> "Upon the papers submitted it appears that the proceedings are promoted at the instance of responsible officers of the Haytian Government, and there is no evidence before me tending to show that the proceedings are in bad faith and malicious, or on insufficient prima facie grounds; and the application for appraisers for the purpose of bonding should therefore be denied."

III.

The undersigned cannot foresee the scope of the oral argument or the contentions of the appellee in this cause, and he ventures to add for the convenience of the court some extracts from its own decisions bearing on the proper construction of the statutes involved, and some decisions of the district courts in admiralty proceedings thereunder.

The neutrality laws of the United States are not strangers to this court, but they have come before it in other relations than the present.

The third section of the Acts of 1794 and 1818 from which section 5283 is taken have been frequently before this court in prize causes, involving captures made by vessels unlawfully fitted out or manned within the United States.

Chief Justice Marshall in the case of the "Gran Para," 7 Wheat., p. 488, speaking of the Act of 1794, says:

> "The third section makes it penal for any person within any of the waters of the United States to be knowingly concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state to cruise, etc.

"It is too clear for controversy that the 'Irresistible' comes within this section of the law also.

"The Act of 1817, Chapter 58, adapts the previous laws to the actual situation of the world by adding to the words 'of any foreign prince or state' the words 'or of any colony, district or people,' etc. The Act of April, 1818, Chap. 83, re-enacts the Acts of 1794, 1797 and 1817 with some additional provisions."

In this same case Chief Justice Marshall, speaking of the contention that the fitting out of the vessel in Baltimore was a commercial venture, and that the hostile character was only assumed at La Plata, says:

"If this were to be admitted in such a case as this the laws for the preservation of our neutrality would be completely eluded so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew to become perfectly legitimate cruisers purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would indeed be a fraudulent neutrality, disgraceful to our own Government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts that the arms and ammunitions taken on board the 'Irresistible' at Baltimore were taken for the purpose of being used on a cruise, and that the men there enlisted, though engaged in form as for a commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe that there was one. Although there might be no express stipulation to serve on board the 'Irresistible' after her reaching the La Plata and obtaining a commission, it must have been completely understood that such was to be the fact. For what other purpose could they have

undertaken this voyage. Everything they saw, everything that was done, spoke a language too plain to be misunderstood."

The Estrella, 4 Wheat., p. 309.
The Bello Corrunes, 6 Wheat., p. 171.
The Santisdima Trinidad, 7 Wheat., 337.

This court decided the case of Gelston *vs.* Hoyt, at the February Term, 1818. The case arose under the Act of 1794, but the words "colony, district or people" had already been introduced into the laws of the United States in the Act of 1817, and were added to the words "prince or state" in all the sections where those words were used in the new law of 1818.

This court had been always disinclined to treat as pirates persons who were committing bona fide hostilities against a particular state.

The case of the United States *vs.* Palmer, 3 Wheat, 611, heard by the Supreme Court at the February Term, 1818, came up on certificate from the Circuit Court for the District of Massachusetts. The proceeding was an indictment for piracy. The acts alleged took place in July, 1817. The case was heard at circuit October 15, 1817. The Act of 1817 had no application to the case yet in the questions of the Massachusetts Circuit Court, which appear in 3 Wheat., page 614, the words "colony, district or people" frequently recur. The fifth, sixth, ninth and tenth questions distinctly mention any revolted colony, district or people, which have thrown off their allegiance to their mother country and *have never been acknowledged by the United States as a sovereign or independent nation or power.*

Chief Justice Marshall, in giving the opinion of the Supreme Court of the United States, says:

"The first four questions relate to the construction of the eighth section of the act for the punishment

> of certain crimes against the United States. The remaining seven questions respect the rights of a colony, or other portion of an established empire, which has proclaimed itself an independent nation, and is asserting and maintaining its claim to independence by arms."

As to the first question the court was of opinion that the crime of robbery committed by a person on the high seas, on board of any ship or vessel belonging exclusively to the subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign prince or state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States; and he continues:

> "This opinion will probably decide the case to which it is intended to apply. Those questions which respect the rights of a part of a foreign empire, which asserts and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. As it is understood that the construction which has been given to the Act of Congress will render a particular answer to those unnecessary, the court will only observe that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be, and can place the Nation in such a position with respect to foreign powers as to their own judgment shall appear wise, to whom are intrusted all its foreign relations, than to that tribunal whose power, as well as duty, is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other, may observe absolute neutrality, may recognize the new state absolutely, or may make a limited recognition of it. The proceedings in courts must depend so entirely on the course of the government that it is difficult to give a

precise answer to questions which do not refer to a particular nation. It may be said generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes and which the new government may direct against its enemy. To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation, to which the court belongs, against that party. This would transcend the limits prescribed to the judicial department. It follows as a consequence, from this view of the subject, that persons or vessels employed in the service of a self-declared government, thus acknowledged to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state. The seal of such unacknowledged government cannot be permitted to prove itself, but it may be proved by such testimony as the nature of the case admits, and the fact that such vessel or person is so employed may be proved without proving the seal."

In the 6th Wheat., page 171, in the case of the "Bello Corrunes," the court say:

"By the second section of the fourteenth article of the Treaty with Spain, citizens, subjects, or inhabitants of the United States are strictly prohibited from taking any commission, or letter of marque, for arming any ship or vessel to act as privateers against the subjects of His Catholic Majesty, or the property of any of them, from any prince or state, with which the said King shall be at war, and it is further provided that if any person of either nation shall take such commission or letters of marque, he shall be punished as a pirate."

"Whatever difficulties there may exist under the free institutions of this country in giving full efficacy

to the provisions of this treaty by punishing such aggressions as acts of piracy, it is not to be questioned that they are prohibited acts and intended to be stamped with the character of piracy, and to permit the persons engaged in open prosecution of such a course of conduct to appear and claim of this court the prizes they have seized, would be to countenance a palpable infraction of a rule of conduct declared to be the supreme law of the land. Some doubts have been suggested on the use of the words 'state at war with Spain.' This court would not readily lean to favor a restricted construction of language as applied to the provisions of a treaty, which always combines the characteristics of a contract as well as a law; but it is not necessary to examine the grounds of these doubts as applied to the present case, because this treaty has been enforced by the provisions of the Act of Congress of the 14th of June, 1797, so as to leave no doubt of its extension to the case of cruising against Spain under a commission from the new states formed in her colonies."

The third section of the Act of 1818 was directly before this Court in a criminal case in 1832.

Only once has a proceeding directly to enf rce the section come before this court and that was in a criminal case. United States *vs.* Quincy, 6 Pet. 445. The Court say (p. 464):

"The instruction which ought to be given to the jury under these prayers involves the construction of the act of Congress touching the extent to which the preparation of the vessel for cruising or committing hostilities must be carried before she leaves the limits of the United States, in order to bring the case within the act.

"On the part of the defendant it is contended, that the vessel must be fitted out and armed, if not complete, so far at least as to be prepared for war, or in a condition to commit hostilities.

"We do not think this is the true construction

of the act. It has been argued that, although the offense created by the act is a misdemeanor, and there cannot, legally speaking, be principal and accessory, yet the act evidently contemplates two distinct classes of offenders. The principal actors, who are directly engaged in preparing the vessel, and another class, who, though not the chief actors, are in some way concerned in the preparation.

. . . . . .

"To bring him within the words of the act, it is not necessary to charge him with being concerned in fitting out and arming. The words of the act are, fitting out or arming. Either will constitute the offense. But it is said such fitting out must be of a vessel armed and in a condition to commit hostilities, otherwise the minor actor may be guilty when the greater would not. For, as to the latter, there must be a fitting out and arming in order to bring him within the law. If this construction of the act be well founded, the indictment ought to charge, that the defendant was concerned in fitting out the '*Bolivar,' being a vessel fitted out and armed, etc.* But this, we apprehend, is not required. It would be going beyond the plain meaning of the words used in defining the offense. It is sufficient if the indictment charges the offense in the words of the act; and it cannot be necessary to prove what is not charged. It is true, that, with respect to those who have been denominated at the bar the chief actors, the law would seem to make it necessary that they should be charged with fitting out and arming. These words may require that both should concur; and the vessel be put in a condition to commit hostilities, in order to bring her within the law. But an *attempt* to fit out and arm is made an offense. This is certainly doing something short of a complete fitting out and arming. To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it. Any effort or endeavor to effect it will satisfy the terms of the law."

"This varied phraseology in the law was probably employed with a view to embrace all persons, of every description, who might be engaged, directly or indirectly, in preparing vessels with intent that they should be employed in committing hostilities against any powers with whom the United States were at peace. Different degrees of criminality will necessarily attach to persons thus engaged. Hence the great latitude given to the courts in affixing the punishment, viz., a fine not more than ten thousand dollars and imprisonment not more than three years.

"We are, accordingly, of opinion that it is not necessary that the jury should believe or find that the 'Bolivar,' when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas was armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offense charged in the indictment."

This court held the word "people" as applied to a recognized government doubtful and obscure but cured by the videlicet in the same case.

"The second and third instructions, asked on the part of the United States, ought also to be given; for, if the jury shall find (as the instructions assume) that the defendant was knowingly concerned in fitting out the 'Bolivar' within the United States, with the intent that she should be employed as set forth in the indictment, that intention being defeated by what might afterwards take place in the West Indies, would not purge the offense, which was previously consummated. It is not necessary that the design or intention should be carried into execution in order to constitute the offense.

"The last instruction or opinion asked on the part of the defendant was:

"'That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was, at the time of the offense alleged in the indictment, a government acknowledged by the United States, and

thus was a *state* and not a *people*, within the meaning of the act of Congress, under which the defendant is indicted; the word *people* in that act being intended to describe communities under an existing government, not recognized by the United States, and that the indictment, therefore, cannot be supported on this evidence.'

"The indictment charges that the defendant was concerned in fitting out the 'Bolivar' with intent that she should be employed in the service of a foreign people; that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the Executive Department of the Government of the United States, before the year 1827. And, therefore, it is argued that the word *people* is not properly applicable to that nation or power.

"The objection is one purely technical, and we think not well-founded. The word *people*, as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power. The words are: 'In the service of any foreign prince or state; or of any colony, district, or *people*.' The application of the word *people* is rendered sufficiently certain by what follows under the videlicet, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word *people* is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the videlicet, only serves to explain what is doubtful and obscure in the word *people*."

The reasoning of the court in its construction and application of the acts for the suppression of the Slave Trade in civil proceedings for the forfeiture of ships is interesting and instructive.

In the case of the Emily and Caroline, 9 Wheat. 386, the vessels were libelled under the Slave Trade Act and the court speaking of that act says:

> "The first branch of the prohibiting part of this section is very broad and comprehensive, using various terms appropriate to the preparation for a voyage: 'Shall not build, fit, equip, load or otherwise prepare any ship,' etc. In the forfeiting part of the section these various terms are not repeated, but doubtless intended to be coextensive and included under the words *so fitted out as aforesaid.* Under this law then the forfeiture is incurred either by fitting out, or in other words, preparing a vessel, within the United States; or by causing a vessel to sail from the United States, for the purpose of carrying on the slave trade; two distinct acts either of which draws after it the same consequence, the forfeiture of the vessel. . . . In admiralty proceedings a libel in the nature of an information does not require all the formality and technical precision of an indictment at common law. If the allegations are such as plainly and distinctly to mark the offense it is all that is necessary. . . .
>
> "The object in view by the section of the law now under consideration was to prevent the preparation of vessels in our own ports which were intended for the slave trade. Hence is connected with this preparation whether it consists in building, fitting, equipping or loading, the purpose for which the act is done. *The law looks at the intention and furnishes authority to take from the offender the means designed for the perpetration of the mischief.* This is not punishing criminally the intention merely; it is the preparation of the vessel and the purpose for which she is to be employed, that constitute the offense and draws after it the penalty of forfeiture. As soon, therefore, as the preparations have progressed so far as clearly and satisfactorily to show the purpose for which they

> are made, the right of seizure attaches. To apply the construction contended for on the part of the claimant, that the fitting or preparation must be complete and the vessel ready for sea before she can be seized, would be rendering the law in a great measure nugatory and enable offenders to elude its provisions in the most easy manner."

And again, alluding to the evidence:

> "There was no attempt whatever by the claimant to explain the object of these particular fitments or to show that the destination of the vessels was other than that of the slave trade. Nor has his counsel on the argument here set up for him any such pretence. We may, therefore, safely conclude that the purpose for which these vessels were fitting was the slave trade; and, if so, the right of seizure attached. We can discover no sound reason for delaying the seizure until the vessels were on the point of sailing. It could only be necessary to render more certain from their complete fitment the purpose for which they were to be employed, and, if that be satisfactorily ascertained at an earlier stage of the preparation, the delay would be useless, and evasion of the law rendered almost certain."

The President's Second Proclamation of Neutrality specially refers to the decision of this Court in Wiborg vs. The United States.

The duty of the Executive is to execute the laws of the United States, and in so doing to follow the construction of those laws by the judiciary. This familiar constitutional maxim is accentuated by the President's last neutrality proclamation.

On the 27th of July, 1896, the President issued his proclamation referring to the previous proclamation of June 12, 1895, and to the fact that since the date of the said proclamation *the neutrality laws of the United States have been the*

subject of authoritative exposition by the judicial tribunal of last resort, this reference being to the decision of this court in the case of Wiborg *vs.* the United States, 163 **U.** S., pp. 632–647, a case arising under Section 5286.

The preamble of the proclamation of July, 1896, thus continues:

> "Whereas there is reason to believe that citizens of the United States, and others within their jurisdiction, fail to apprehend the meaning and operation of the neutrality laws of the United States, *as authoritatively interpreted as aforesaid*, and may be misled into participation in transactions which are violations of said laws, and will render them liable to the severe penalties provided for such violations.
>
> "Now, therefore, that the laws above referred to as judicially construed may be duly executed, *that the international obligations of the United States may be fully satisfied*, and that their citizens and all others within their jurisdiction, being seasonably apprised of their legal duty in the premises, may abstain from disobedience to the laws of the United States and thereby escape the *forfeitures* and penalties legally consequent thereon."

In the previous proclamation of June 12, 1895, there was a summary of the prohibitions contained in the laws of the United States, in which it is stated amongst other things that citizens of the United States, as well as others being within and subject to their jurisdiction, are prohibited—

> "*from taking part in such disturbances adverse to such established government* . . . by fitting out or arming, or procuring to be fitted out and armed, ships of war for such service."

Undoubtedly the laws of the United States do contain the prohibition above stated, but they also contain other provisions not fully covered by the recitals of the proclamation of 1895. The judicial exposition of the meaning of Section 5286 by the Supreme Court of the United States has been

considered by the President a matter of sufficient importance to warrant his second proclamation, calling attention to that judicial construction. In the second proclamation as above quoted he warns citizens and others within the United States not only to avoid penalties, which is all that the Section 5286 imposes in the way of punishment, but also *forfeitures.* The section of the neutrality laws which provides for forfeitures is Section 5283, which provides for the *forfeiture of vessels, their tackle, apparel and furniture, together with all materials, arms, munitions, and stores, which may have been procured for the building and equipment thereof.*

Section 5283 has been construed and forfeitures decreed in three different Districts in the case of unrecognized insurgents, and where the ships were not technically ships of war.

This section has also been the subject of authoritative judicial exposition, not, it is true, by the judicial tribunal of last resort, but by three courts of competent jurisdiction, district courts of the United States, in three different State of the Union, each in the cases of insurgents unrecognized as belligerents.

Reference is made to the case of the Mary N. Hogan, 18 Federal Reporter, page 529, where a forfeiture under Section 5283 was decreed by Judge Brown in the District Court of the United States for the Southern District of New York, on the 23d of November, 1883, of a—

> "steam tug, of about 37 tons register, 90 feet long, and 20 feet beam, and 9 feet depth of hold, built for ordinary towing service about the harbor of New York, in no respect distinguishable by any peculiarities from the numerous other tugs of her class in this port."

Also to the cases of The United States *vs.* 214 Boxes of Arms, etc., and the United States *vs.* 140 Kegs of

Gunpowder, 20 Federal Reporter, page 50, in which Judge Hughes, in the District Court of the United States for the Eastern District of Virginia, on the 4th day of February, 1884, decreed two forfeitures under Section 5283 of the Revised Statutes of the United States, of the arms and munitions provided for the same hostile expedition proceeded against in the above cause. The third proceeding referred to is the case of the "City of Mexico," 28 Federal Reporter, page 148, in which Judge Locke, in the District Court of the United States for the Southern District of Florida, decreed a forfeiture, under Section 5283, of the ship "City of Mexico," not as an armed vessel, but as a vessel furnished and fitted out with intent that such vessel shall be employed to *commit hostilities*.

In the three proceedings above mentioned both the ships and the munitions of war were valuable, but the owners, whoever they were, prosecuted no appeal from the decisions of the district courts, which therefore not only disposed of the right of private property by forfeiting the vessels and materials, under the provisions of Section 5283, but remain, until a different construction be announced by a higher court, as authoritative judicial constructions of the meaning of that section.

All these cases were proceedings in admiralty, tried and determined by the court without the aid of a jury. Neither the Government of the United States, which filed the libel in rem, nor the claimants, who sought to assert their rights of property to prevent a forfeiture, had any right under the Constitution and laws of the United States to a trial by jury.

The Act of 1845, which permitted a jury in certain cases in admiralty now incorporated in Section 566, R. S., was limited to "causes of admiralty and maritime jurisdiction, relating to any matter of contract or tort," and the same section had already provided that the trial of issues of fact in the District courts in all cases, *except cases in equity and cases of admiralty and maritime jurisdiction, shall be by jury.*" The forfeiture of vessels by proceedings in admiralty on the

instance side of the court have been sought and decreed under the laws for the suppression of the slave trade (United States *vs.* "The Sally," 2nd Cranch, 406), under the non-intercourse laws (United States *vs.* Betsey and Charlotte, 4th Cranch, 443), under the laws in regard to seal fishing in Alaska (The W. P. Sayard ex parte Cooper, 143 United States; The Silvia Handy, ditto), under the custom laws, Sections 2868 and 3109 (United States *vs.* Coquitlan, District court of Alaska, 1893), and under the Navigation Laws, Section 4179.

The Mary N. Hogan.

In the opinion on the merits (18 F. R., p. 529) Judge Brown says:

> "*From the evidence it clearly appears that though the 'Hogan' was wholly unadapted to effective naval operations against any considerable organized opposition, she could be of the greatest service to the insurgents by her light draft and considerable speed in landing or taking off men at unprotected points of the coast of Hayti*, by watching her opportunities of running in and out, as well as in offensive demonstrations against defenseless parts of the islands, with little to fear from the slight naval resources of the lawful government."

After completing the review of the testimony the learned judge continues:

> "The only rational inference that can be drawn from the above facts is that the 'Hogan' was designed to be used for the conveyance of arms and ammunition in aid of the insurrectionists in Hayti, and for other aid, and such hostile demonstrations as she was fit to make against the defenseless parts of the coast."

Later the judge speaks of the pretence that the "Hogan" was destined upon a legitimate business as: "only a cover

for departure upon a *hostile expedition*," and finally concludes that the evidence established—

> "a *hostile* expedition organized and dispatched from our ports in separate parts, to be united at the common rendezvous on the high seas, and to proceed thence to Hayti in completion of the original *hostile* purpose with which the different parts were dispatched from our shores. Such an expedition is as much within the prohibition of Section 5283 of the Revised Statutes as if all its parts were united and complete upon one single vessel. . . . A decree for the condemnation of the 'Mary N. Hogan' must therefore be awarded."

United States vs. 140 Kegs of Powder.—United States vs. 214 Boxes of Arms.

The case of the District Court of the United States for the Eastern District of Virginia, 20 Federal Reporter, page 50 was with reference to the very arms and ammunition which were to have been placed on board the "Mary N. Hogan," which were seized in the port of Richmond on board the schooner "E. G. Erwin."

Judge Hughes, in his opinion in the two cases against the Boxes of Arms and Kegs of Powder, says:

> "The two proceedings are founded upon Section 5283 of the Revised Statutes of the United States, which, so far as applicable, to this case provides, that every person who, within the limits of the United States, attempts to fit out and arm, or is knowingly concerned in the furnishing, fitting out or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign people to cruise or commit hostilities against the citizens of any foreign state with which the United States are at peace, shall be punished as provided by law; and that all the materials, arms and ammunition which may have been procured for the equipment of such a vessel shall be forfeited."

Speaking of the material facts with relation to the "Mary N. Hogan," which were, of course, part of the evidence for condemnation, in regard to the arms the learned judge continues:

> "I probably have a right to regard that part of the case before me as res judicata; but feeling disposed, in the cases at bar, to consider the question of the character and destination of the 'Hogan' as an original one, I have gone anxiously and thoroughly over all the voluminous evidence before me on that subject, and find myself constrained to adopt precisely the conclusions that were reached by Judge Brown, and are set forth in his opinion in that case."

To the searching analysis of the facts applied by Judge Brown in the case of the "Hogan," Judge Hughes adds the following:

> "The 'Hogan' bore less than two feet of freeboard. A cargo of 20 or 30 tons, which was the weight of these munitions, would have put down her deck to within 12 inches of the water. Even on a smooth July sea, a voyage to the West Indies would have been a desperate commercial venture, and yet we hear nothing of insurance either upon vessel or cargo. Commercially, the enterprise would have been reckless. As a military venture it was no more desperate than military raids usually are, especially upon the high seas."

Again,

> "The general test of contraband as to neutrals is whether the contraband goods are intended for sale in a neutral market, or whether the direct and intended object is to supply the enemy with them. . . . In the case at bar the question is in different form, while the principle is identical. It concerns the furnishing, fitting out, and arming, in a neutral jurisdiction, of a vessel about to proceed directly to the theatre of hostilities, and to engage in military operations. 'The Hogan' as already concluded,

was intended for such a purpose, and on receiving these arms was intended to be directly bound to the waters of Hayti. These military goods were not to be taken to a neutral port to be sold in open market; they were not for sale at all; they were intended to be used on that steam tug in flagrant hostilities. When they left Frazer's warehouse they ceased to be articles of commerce. They were no longer for sale. They were to be put in a covert and deceptive manner upon a vessel at sea, and to constitute her outfit for engaging in hostilities against a state with which the United States are at peace. It is useless to cite legal authorities on this subject. The law is in the form of an express statute. Its principles are plain and elementary, and need only to be stated to be comprehended and approved." . . .

"It is useless for me to reiterate what has so often been ruled in principle, that the placing of these goods directly on the 'Hogan' by those knowingly concerned in fitting out that vessel, was not necessary to justify the condemnation of the goods. If they had passed through the hands of many draymen, and other intermediaries, and over many decks, before reaching the vessel whose outfit and armament they were intended to be, that ultimate destination made them guilty goods, and subjected them to condemnation."

"I will sign a decree of condemnation and sale in both of these cases."

The City of Mexico.

In the case of the "City of Mexico," 28 Federal Reporter, page 148, Judge Locke, in the District Court of the United States for the Southern District of Florida, thus recites the allegations of the libel:

"The libel for forfeiture alleges that certain persons were knowingly concerned in the furnishing and fitting out of said vessel, with the intent that she should be employed to cruise or commit hostilities

against the people of the State of Honduras, with whom the United States is at peace." . . .

"The terms 'furnishing' and 'fitting' have no legal or technical meaning which requires a construction different from the ordinary acceptation in maritime and commercial parlance, which is to supply with anything necessary or needful. That by the furnishing and fitting out is intended something different from the arming, is not only apparent from the language of the statute, but it has been judicially determined in United States *vs.* Quincy, 6 Peters, 445. This vessel was furnished and fitted out, in the usual acceptation of the terms, provided with the necessary supplies, and put in a condition for proceeding to sea, within the United States. Whether she was well furnished or thoroughly fitted out is not the question, if she was so supplied as to proceed on her way. She was furnished with the ordinary engineer's supplies and steward's stores, and sailed from New York the 22d of December, 1885. What was the intent with which she was fitted out, and either dispatched or taken on her way by the parties in charge, becomes a most important and difficult question, involving conclusions both of law and fact.

"Whatever may have been the intention of the legislators regarding the particular class of hostilities they were desired to prevent, all we have to decide from is the language with which they have clothed their ideas, and this is broad enough to include all classes of hostilities. It has been ably argued that unless the vessel is so armed that she herself can be the offending party or thing, or, in other words, carries such an armament as can throw projectiles from her port, or is equipped as a man-of-war or armed vessel, the statute will not apply. The terms 'peaceful' and 'warlike,' 'friendly' and 'hostile,' are thoroughly recognized; and the line so plainly marked between what should be the course and conduct of a vessel engaged in a peaceful commercial venture, and one fitted, prepared, and intended for hostilities, is so distinct and well defined as to permit no mistake, nor require a reference to a judicial decision.

> "A peaceful act, a peaceful voyage, cannot be a hostile one; nor can acts looking towards war or enmity escape from the general term 'hostilities.' It is true that vessels may frequently be engaged in transporting troops as passengers, and war material as freight, without themselves having any connection with the actual hostilities contemplated, so that their voyages in no way partake of the nature of hostile acts, nor they be liable to be charged with the commission of hostilities. The 'Lafayette' and 'Ville de Paris,' cited in Hall, Int. Law, 564. Or where troops, conveyed as passengers only, are landed as such, although bound on a hostile expedition, where all connection and relation existing between them and the vessel are to be terminated at their leaving her side, the question becomes one of more difficulty. . . . A vessel is a passive instrument, and is but made the means of success; and it matters but little, in the effect of her hostilities, whether she throw shot and shell from her ports, *or dispatched boat-loads of armed men from her gangways.*"

In the case of the "City of Mexico" the pretence was that she was bound on a peaceful and legitimate voyage connected with a scheme of colonization. The learned judge, after reviewing the circumstances, concludes:

> "The whole character of the voyage shows it was not a commercial one. No cargo was taken, no cargo looked for—only arms and ammunition, which are not the implements of peaceful colonization or agriculture. The arms were not shipped or to be received for sale as a financial speculation. There was no war in that part of the world going on or in contemplation, except what was intended by General Delgado, for whom they were intended. I can arrive at but one conclusion: *that acts of hostility were contemplated and intended at the time of furnishing and fitting out the 'City of Mexico,'* in which she was to take an active part, and that it was intended that she should receive arms and ammunition, and, in the language of the statutes, *she should commit hostilities.*
>
> "The decree of forfeiture must follow."

CONCLUSION.

The undersigned has endeavored to place at the disposition of the Court such aid as he could afford for a consideration of this cause, not only as to the application of the section to the insurgents in Cuba, and to the propriety of the release of the vessel on bond, but also as to the construction of the statute in case the course of the argument or the Courts' consideration should lead in that direction.

Repectfully submitted.

CALDERON CARLISLE,

Amicus Curiæ.